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No. _____ OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ROBERT M. BROWN,
Petitioner

v.

THE STATE OF KANSAS

Petition for Writ of Certiorari
To the Supreme Court of Kansas and
The Court of Appeals of Kansas

PETITION FOR WRIT OF CERTIORARI

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101 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Kansas Supreme Court's unlawful refusal to publish landmark opinions of the Kansas Court of Appeals, thus secretly perpetuating different application of Kansas Statutes and a different standard of review for ineffective assistance of counsel among Kansas citizens, violates the Fourteenth Amendment's requirements of due process, equal protection, and public access to the judicial process?

II. Whether the Kansas Supreme Court's unlawful order denying a *pro se* appellant without the means to secure appellate counsel the Review by Petition which is guaranteed to him as a matter of right under both the statutes of the State of Kansas and the published rules of the Kansas Supreme Court violates the Fourteenth Amendment's requirements of due process and equal protection?

III. Whether the requirement promulgated within the Court of Appeals' opinion that an accused personally object to his attorney's representation at the beginning of a trial in order to preserve the issue of ineffective assistance of counsel violates the Sixth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment and this Court's prohibition against presumption of acquiescence in the loss of fundamental rights?

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OPINION BELOW

The Court of Appeals of the State of Kansas, on direct appeal, affirmed Mr. Brown's convictions. The Memorandum opinion of the Court of Appeals of the State of Kansas, issued *Per Curiam* and not designated for publication, is unreported (a1-a7).The Supreme Court of Kansas, on Petition for Review as a matter of right, denied review of the opinion of the Court of Appeals of the State of Kansas to Mr. Brown. The order of the Supreme Court of Kansas denying review is reprinted in the appendix hereto at a10 . The Kansas Supreme Court's final denial of discretionary review is also unreported (a8). The Supreme Court of Kansas, on Motion for Publication, of the decision of the opinion of the Court of Appeals of the State of Kansas, denied the motion. The order of the Supreme Court of Kansas denying the motion for publication is unreported (a10).

PETITION FOR WRIT OF CERTIORARI

Robert M. Brown respectfully submits this petition for a writ of certiorari to review the constitutionality of the order of the Supreme Court of Kansas denying his review by petition as a matter of right in State of Kansas v. Robert M. Brown, filed on November 9, 1999 and portions of the underlying decision of the Kansas Appellate Courts affirming his convictions on three counts of domestic battery, filed on August 13, 1999.

STATEMENT OF JURISDICTION

The Opinion of the Court of Appeals of the State of Kansas from which petitioner Brown seeks review was issued on August 13th, 1999. The order of the Kansas

Supreme Court from which petitioner Brown seeks relief was issued on November 9, 1999 and became final on December 21, 1999. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. The text of the Fifth Amendment to the United States Constitution. (a11)

B. The text of the Sixth Amendment to the United States Constitution. (a11)

C. The text of the Fourteenth Amendment, Section 1 to the United States Constitution. (a11)

D. Kansas Statutes Annotated § 21-3412, which is set forth in the Appendix at a13. K.S.A. § 21-3412 provides in relevant part that for the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing, that:

> "(O)nly convictions occurring in the immediately preceding five years *including prior to the effective date of this act* shall be taken into account . . ."
>
> *K.S.A. 21-3412(4)(C)(iii)* (Emphasis Added)
>
> "[I]t is irrelevant whether an offense occurred before or after conviction for a previous offense."
>
> *K.S.A. 21-3412(4)(C)(iv)*

E. Kansas Statutes Annotated § 22-3602, which is set forth in the Appendix at a16. *K.S.A. § 22-3602* provides in relevant part that:

> "[A]ny . . party [to a criminal case on appeal] may appeal to the Supreme Court as a matter of right in any case in which a question under the constitution of either the

United States or the state of Kansas arises for the first time as a result of the decision of the court of appeals."

K.S.A. 22-3602(d)

F. Kansas Supreme Court Rule 8.03(e)(1), which is set forth in the Appendix at a18. Kansas Supreme Court Rule 8.03(e)(1) reinforces the mandate of *K.S.A. 22-3602(d)*

G. Kansas Statutes Annotated § 60-2106, which is set forth in the Appendix at a19. Kansas Statutes Annotated § 60-2106 provides in part as follows:

> "A memorandum opinion may be prepared in any case where no new question of law is decided or which is otherwise considered as having no value as precedent. Such a memorandum opinion need not contain a syllabus or statement of facts. In all other cases, a formal opinion shall be prepared."
>
> *K.S.A § 60-2106*

H. Kansas Supreme Court Rule 7.04, which is set forth in the Appendix at a20. Kansas Supreme Court Rule 7.04 provides in relevant part as follows:

> "Opinions of the Appellate Courts, whether signed or per curiam, shall be memorandum opinions or formal opinions according to the requirements of K.S.A. § 60-2016.
>
> Opinions shall be published in the official reports only when they satisfy the standards set out in this rule. Disposition by memorandum, without a formal published opinion, does not mean that the case is considered unimportant. *It does mean that no new points of law making the decision of value as precedent are believed to be involved.*

> . . . A party or other interested person who believes that an opinion of either the Supreme Court or Court of Appeals which is not designated by the court for publication meets the standards for publication established by this rule or otherwise has substantial precedential value may file a motion with the Supreme Court asking that it be published."
>
> *Kansas Supreme Court Rule 7.04* (Emphasis Added)

CONCISE STATEMENT OF THE CASE

Background

This case involved four incidents of domestic battery alleged to have been committed by petitioner against RKG. In each case, all evidence except the statement given to the police by RKG was entirely circumstantial. (R. V., 58-9, 69, 78, 83, 89, 101, 108)

In pre-trial proceedings, the defendant was represented by Kevin Moriarty. On August 12th, 1996 the State filed a Motion to Admit Evidence pursuant to *K.S.A. 60-455* or in the alternative evidence of continuing course of conduct. (R. I, 2) Although the State advised Mr. Moriarty in open court that the motion was "pretty lengthy" (R. IV, 7-8), Mr. Moriarty did not file a responsive pleading. At the 60-455 hearing on 09/17/96, although the State had given Mr. Moriarty the option to dismiss and re-file all the charges (R. XVII, 31-32), he agreed without argument to have all counts combined. On 10/15/96, Mr. Moriarty offered no opposition to having an additional charge of domestic battery set for trial at the same time as the three other counts. (R. XIV, 3)

On the very morning of the trial, the firm's most junior associate, J. Ryan Hare, was substituted as counsel for the defendant. Mr. Hare tried the case on 10/23/96. No defense was presented. (R V, 110) The trial court found the defendant guilty. The trial Court then ruled Mr. Brown partially indigent and appointed counsel for Mr. Brown's motion for new trial.

Testimony of The Attorneys

Mr. Hare testified in this post-trial proceeding. Mr. Hare admitted in testimony that he did not have a trial knowledge of the case. (R. VI, 27) Mr. Hare testified he did not know who the witnesses were or who they might be. (R. VI, 7) Mr. Hare testified he had been sworn in as a lawyer less than two month's prior to the trial. (R. VI, 5) He had not reviewed the police reports prior to the morning of the trial. (R VI, 6-7) He did not know until the morning of trial that he would be trying the case (R. VI, 7-8), and did not take the case file home with him the night before the trial because the file was still in Mr. Moriarty's possession. (R. VI, 8)

Mr. Hare testified that his first opportunity to prepare came hours before the trial. (R. VI, 8) He had documents that could show that the victim had undertaken to defraud a civil court in concert with her domestic violence complaints (R. XII, Defendant's Exhibit A-2/14/97) in his possession at the trial (R. VI, 10). Mr. Hare testified that he and the Defendant had discussed using the documents in the Defendant's defense (R. VI, 12), and Mr. Hare testified that these documents would have been important to bring to the Court's attention (R. VI, 23). Nonetheless, these records were never produced by trial counsel during the proceeding. (R. V, 110; 1-123)

Mr. Hare testified that he would have had no time to call witnesses or produce exhibits of evidence before the trial, and that production of these items was clearly his responsibility as the attorney in charge of the case. (R. VI, 27) In testimony, Mr. Hare admitted numerous shortcomings and made no excuses. He testified that he had acted in ways which were contrary to his beliefs regarding strategy (R. VI, 23), and made no attempt at hypothesizing a strategy which could justify his appearance in the case without the requisite knowledge to try it.

Mr. Brown's pretrial counsel, Kevin Moriarty also testified at the motion for new trial. Moriarty testified that he took actions which were calculated to incriminate his own client because he was sympathetic to the state's complaining witness. (R. XVII, 27;51-52)

Moriarty testified that he never spoke with Mr. Brown in preparation of the criminal case, (R. XVII, 7) and that not one billable minute of time was expended throughout his months of representation in preparation for Mr. Brown's criminal case (R. XII, Defendant's Exhibit E).

The record also shows that Mr. Moriarty refused to honor the Defendant's requests to subpoena witnesses (R. XVII, 27) and obtain police reports regarding lies to the police and violent attacks against the defendant by RKG (R. XVII, 71). When the defendant attempted to hire an expert to unearth some of the psychological aspects of RKG's condition, Mr. Moriarty refused to cooperate and dismissed his client's wish to present a theory of defense as "bullshit". (R. XVII, 48)

The Appeal

The trial Court denied Mr. Brown's motion for new trial. Mr. Brown was advised by his Court appointed counsel that he did not qualify for the appellate defender. Lacking funds to retain private counsel, Brown took direct appeal *pro se* to the Court of Appeals of the State of Kansas on grounds of insufficiency of evidence, ineffective assistance of counsel, conflict of interest, constructive denial of counsel, and denial of his constitutional right to jury trial. Excerpts from Brown's Appeal brief are presented in the Appendix at a42.

With regard to conflict of interest, Brown argued that since his defense counsel admitted in testimony to taking action designed to incriminate Brown, that prejudice was not required to obtain post conviction relief. In support of his position, Brown cited *Cuyler v. Sullivan* , 446 U.S. 335, 349-350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) and *State v. Jenkins*, 257 Kan. 1074, at Syl. 5 (1995), among others.

With respect to constructive denial, Brown argued that when Mr. Hare stood in for Mr. Moriarty on the morning of trial, by his own testimony without a trial knowledge of the case; without meaningful opportunity to prepare a defense, conduct an investigation, gather evidence or subpoena witnesses; without a knowledge of who the witnesses were or who they might be; and without even so much background in the case as to avail himself of documents which he had in his possession and which he admitted in testimony would have been important to Brown's defense, Hare created a circumstance where "the likelihood that any lawyer, even a fully competent one,

could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial" *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984), and therefore as showing of prejudice was not required. Brown also argued that Moriarty "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" at the 60-455 motion, which was "a critical stage of his trial", and that no showing of prejudice was required. *Cronic* at 658.

With respect to the issue of Constitutional Right to Jury trial, Brown argued that, under the provisions of K.S.A. § 21-3412 dealing with sentencing enhancement for recidivistic domestic battery, he was subjected at trial to a maximum authorized term of imprisonment of one year on multiple counts, and therefore had a constitutional right to a Jury Trial. Citing *State v. Irving*, 216 Kan. 588, 590, 522 P.2d 1225 (1975) and *State v. Jones*, 19 Kan. App. 2d 982,984, 879 P.2d 1141 (1994), Brown argued that since under Kansas Law a defendant is required to waive his right to a jury trial "either in writing or in open court on the record", and since that was not done in Brown's case, Kansas cases require that the convictions be vacated and the case remanded for a new trial.

The Decision of The Court of Appeals

On August 13th, the Kansas Court of Appeals filed its memorandum opinion, affirming Mr. Brown's convictions. (a1) The Kansas Court of Appeals spoke to the substitution of J. Ryan Hare on the morning of the trial and admittedly without a trial knowledge of the case by stating:

> "[W]e find nowhere in the record did Brown object to Hare's representation of him at trial. If Brown seriously objected to Hare's

representation, then he should have made his objections at the beginning of the trial."

The Court of Appeals ruled regarding Brown's Constitutional right to a jury trial as follows:

> "Brown argues this court should apply the Kansas Legislature's 1996 amendments to K.S.A. 21-3412 which enhanced the penalties for subsequent convictions of domestic battery. A first conviction of domestic battery remained a class B misdemeanor with a maximum sentence of 6 months' incarceration. However, a second conviction of domestic battery carried a classification as a class A misdemeanor with a maximum sentence of 1 year incarceration and a third conviction was a felony with a maximum sentence also of 1 year incarceration. See K.S.A. 1998 Supp. 21-3412(c)."

> "The 1996 amendments to K.S.A. 21-3412 do not apply in Brown's case. At the time he was charged with all of the counts of battery, he did not have any previous convictions. It would have been a violation of the prohibition against ex post facto laws and a violation of his due process rights to sentence him on the second and third convictions as if his first conviction had occurred before he committed the second and third offenses. See, e.g., *Crane v. Mitchell County U.S.D. No. 273*, 232 Kan. 51, 55-56, 652 P.2d 205 (1982); *Garner v. Nelson*, 25 Kan. App. 2d 394, 398, 963 P.2d 1242 (1998). Consequently, the maximum penalties did

not exceed the 6-month threshold, and Brown had no constitutional right to a jury trial."

The Court of Appeals made no mention of Mr. Moriarty's specific actions to incriminate Mr. Brown, and did not address the standard of review for Conflict of Interest under Kansas and United States Constitutional Law.

The Court of Appeals made no mention of Mr. Brown's arguments regarding constructive denial, and did not address the standard of review for Constructive Denial under Kansas and United States Constitutional Law.

The Rulings of the Kansas Supreme Court

On September 10th, 1999 Mr. Brown, still *pro se*, filed in the Kansas Supreme Court a Motion to Order Publication of the Memorandum Opinion of the Court of Appeals. (a63) In that Motion, Brown noted that the Court of Appeals decision declared *K.S.A. 21-3412* unconstitutional. Relevant text is presented below:

> "This opinion supersedes and rules unconstitutional *K.S.A. 21-3412*, which states in relevant part that for the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing, that:
>
> > '(O)nly convictions occurring in the immediately preceding five years *including prior to the effective date of this act* shall be taken into account . . .'
>
> *K.S.A. 21-3412(4)(C)(iii)* (Emphasis Added)

'(I)t is irrelevant whether an offense occurred before or after conviction for a previous offense. *K.S.A. 21-3412(4)(C)(iv)*'

"As these provisions clearly permit the court to sentence a defendant on second and third convictions as if his first conviction had occurred before he committed the second and third offenses, the ruling of the Court of Appeals in the above captioned case has adjudicated K.S.A. 21-3412(4)(C)(iii) and K.S.A. 21-3412(4)(C)(iv) violative of due process rights and the prohibition against ex post facto laws and therefore unconstitutional."

Brown also made note of the Court of Appeals decision that failure to object to counsel's ineffectiveness prior to trial waives the issue in post-trial proceedings.

"The Court of Appeals stated on Page 5 of its decision, 'If Brown seriously objected to Hare's representation, then he should have made his objections at the beginning of the trial.' This decision overrules decades of prior law."

'The courts must indulge `every reasonable presumption against waiver' of the right to counsel, and will `not presume acquiescence in the loss of fundamental rights [i.e., the right to counsel].'" *State v. Lowe*, 18 K.A. 2.d 72, 74, 847 P.2d 1334 (1993) (Citations Omitted)'

"The Court of Appeals' requirement here that a defendant express dissatisfaction with his trial counsel before trial to preserve a later claim of ineffective assistance resulting from circumstances which were unknown to the defendant at the time of trial presumes acquiescence through silence in the loss of fundamental rights."

Motion to Order Publication of Memorandum Opinion (a63)

Also on September 10th, Brown timely filed his Petition for Review in the Kansas Supreme Court, which is reproduced in the appendix at a26. Brown's petition stated on page 1 as follows:

"The Defendant respectfully requests that this Court Review and reverse the decision of the Court of Appeals wherein the Court affirmed the Defendant's convictions of three counts of domestic battery. Issues A, B and C involve constitutional questions which arise here for the first time as a result of the decision of the Court of Appeals. This request is made as a matter of right pursuant to K.S.A. 22-3602(d) and pursuant to Supreme Court Rule 8.03."

On November 9th, 1999, the Kansas Supreme Court denied both Brown's Motion to Order Publication of the Memorandum Opinion and his Petition for Appellate Review as a matter of right. (a9;a10) On November 16, 1999, Brown sent a letter to each of the seven justices of the Kansas Supreme Court, care of Court Clerk Carol Green.

(a22) Green filed the letter for treatment as a motion to reconsider on November 17th, 1999 at 11:14 A.M. and informed Brown by telephone that the letter would be so treated.

The letter stated in part:

> "Three issues under the Constitution of either the United States, the State of Kansas, or both arise for the first time as a result of the decision of the Court of Appeals in this case. Denial of my Petition for Review is not within the lawful discretion of the Supreme Court of the State of Kansas under these circumstances. Denial violates K.S.A. 22-3602(d), Supreme Court Rule 8.03(e)(1), and my due process rights to "an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." *Crane v. Mitchell County U.S.D. No. 273*, 232 Kan. 51, 56, 652 P.2d 205 (1982)."

On December 21, 1999, the Kansas Supreme Court denied Brown's motion to reconsider, and the decision of the Court of Appeals became final.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of the State of Kansas has secretly declared *K.S.A. 21-3412(4)(C)(iii) and (iv)*, a Kansas statute, unconstitutional, and the Supreme Court of Kansas refuses to either review or publish the decision of the Court of Appeals although required to do so by Kansas Law and its own rules. The decision of the Court of Appeals is a decision of first impression to which petitioner has an

appeal to the Supreme Court of Kansas as a matter of right pursuant to *K.S.A. 22-3602(d).* The law of the state of Kansas provides that "[A]ny . . party [to a criminal case on appeal] may appeal to the Supreme Court as a matter of right in any case in which a question under the constitution of either the United States or the state of Kansas arises for the first time as a result of the decision of the court of appeals." *K.S.A. 22-3602(d).* The rules of the Kansas Supreme Court provide as well that "any party may appeal as a matter of right from a final decision of the Court of Appeals in any case in which a question under the Constitution of either the United States or the State of Kansas arises for the first time as a result of the decision of the Court of Appeals." *Kansas Supreme Court Rule 8.03(e)(1)*

In spite of this, the Supreme Court of the State of Kansas refuses to either compel publication of this declaration or review the decision of the Court of Appeals, thereby allowing unconstitutional sentencing enhancements to continue throughout the State.

The action of the Kansas Supreme Court is therefore a violation of the equal protection clause of the Fourteenth amendment, the due process clauses of the Fifth and Fourteenth amendments, and the defendant's Sixth and Fourteenth Amendment rights to public judicial proceedings.

But the implications here are much broader. If State Courts are permitted to so impede access to the judicial process, then the right to public judicial proceedings is jeopardized for every citizen of this Nation, and a long standing and important check against potential abuses of State Judicial power will be removed from the American system of justice.

Additionally, the State Supreme Court's denial of Mr. Brown's appeal of right, and therefore his due process rights, was done with purpose and impunity despite notice in writing, personally served to each and every Justice of the Kansas Supreme Court, of the applicable constitutional implications. This Court has never before been called upon to quell the power of a State's Highest Court which has purposefully undertaken unconstitutional action of this magnitude. The national implications are tremendous, for to uphold the State Supreme Court's order denying the due process which is guaranteed by the Fourteenth Amendment would call into question the Constitutional interpretations of this Court as the Supreme law of the land, as well as the validity of their application to the States through the Fourteenth Amendment.

By denying Brown's appeal of right, the Supreme Court of Kansas has taken action which is at odds with Constitutional due process and equal protection law in each and every federal and state jurisdiction, not excluding Kansas. Similarly, by refusing to publish the decision of the Kansas Court of Appeals, which is required by both State Statute and by Kansas Supreme Court Rules, the Kansas Supreme Court has in effect ensured that neither denial of this petitioner's due process rights nor the far reaching implications of the decision of the Kansas Court of Appeals will ever be subjected to public scrutiny absent intervention by this Court.

The implications of doing nothing would be as far-reaching and profound as they would be deeply buried from view. That these questions involve a *pro se* appellant, far from being a mitigating factor, simply compounds the constitutional implications of the action taken here in that it raises equal justice questions which would not arise if this appellant were represented by counsel. Indeed, it is not altogether unreasonable to question whether the action of

the State Courts would have been the same if this defendant were in fact competently represented and thus perceived as having the resources to mount a meaningful challenge.

Petitioner does not suggest that the actions of the State Courts were borne out of sinister purpose or done with bad intentions. More likely, they were borne out of preconceived notions regarding the typical merits of the *pro se* appeal, and done with an eye towards expediency and finality within the justice system. But good intentions do not make this action any less arbitrary, fanciful, capricious, or repugnant to the Constitution of the United States. To do nothing is to take a long step down a very dangerous path, for inaction would constitute an endorsement of the arbitrary exercise of absolute, unchecked power by State Courts.

Second, the high Courts of Kansas have effectively disposed of and denied all ineffective assistance of counsel claims in the State of Kansas by placing the burden on the defendant to object to his counsel's ineffectiveness before the defendant could possibly be aware of it. This decision is squarely at odds with prior rulings of this Court in that it unconstitutionally presumes acquiescence in the loss of fundamental rights. The decision is also irreconcilable with the requirements espoused by this Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052, 2064-2069 (1984) Additionally, it imposes a requirement upon each and every defendant who cannot foretell with certainty that his attorney will perform acceptably to drive a wedge between himself and his counsel at the onset of trial by objecting to his attorney's representation.

ARGUMENT

1. The Kansas Supreme Court's unlawful refusal to publish the landmark opinion of the Court of Appeals, thus secretly perpetuating different application of Kansas Statutes and a different standard of review for ineffective assistance of counsel among the citizens of Kansas, violates the Fourteenth Amendment's requirements of due process, equal protection, and public access to the judicial process.

"[T]he Judiciary is not free to exercise all . . . power; it may exercise only the judicial power." *Missouri v. Jenkins*, 495 U.S. 33, 110 S. Ct. 1651, 109 L. Ed. 2d 31, 58 U.S.L.W. 4480 (1990)

That the Judiciary must not be left unchecked and without scrutiny is also a postulate of the American legal system. More than 70 years ago, Chief Justice Taft spoke timelessly to the necessity of checks and balances within the Judicial system.

> "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a Judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Tumey v. Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, (1927)

In 1948, the *Oliver* Court made clear that the most important of these checks and balances was public scrutiny of the judicial process.

> "[S]uppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single Judge, – that Judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance. (Citations Omitted)"

In Re Oliver, 333 U.S. 257, 271, 68 S. Ct. 499, 506, 92 L. Ed. 682, (1948)

"[J]ustice must satisfy the appearance of justice." [*Offutt v. United States*, 348 U.S. 11, 14] Our Courts have held that "the public has the right to be informed as to what occurs in its courts" [*Estes v. Texas*, 381 U.S. 532, 541-542; 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965)] because open judicial proceedings keep the triers of fact "keenly alive to a sense of their responsibility and to the importance of their functions." [*Gannett Co. v. DePasquale*, 1979.SCT.2395, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979)] Hence, "process demands appropriate regard for the requirements of a public proceeding . . .for *all* adjudications through the exercise of

the judicial power, barring narrowly limited categories of exceptions such as may be required by the exigencies of war." (Emphasis added)" [*Levine v. United States*, 362 U.S. 610, 616, 80 S. Ct. 1038, 1042, 4 L. Ed. 2d 989 (1960)]

In *Richmond Newspapers v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed 2d 973 (1980), noting that the United States Supreme Court has "has persistently defended the public character of the trial process", this Court stated:

> "[P]ublic access to court proceedings is one of the numerous checks and balances of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. (Citations Omitted)."
> *Id* at 557

The *Richmond* Court went on to find that "trial closures at the unfettered discretion of the Judge" were violative of the Fourteenth amendment to the United States Constitution.

The legislature of Kansas had these fundamental precepts in mind when it enacted Kansas Statutes Annotated § 60-2106, which assures to its citizens that under the law they will have the right to review the workings of their judicial system at each significant step of the way. Indeed, the only judicial pronouncements which may escape public scrutiny under Kansas law are those "where no new question of law is decided" or those "having no value as precedent." *K.S.A § 60-2106.*

The Supreme Court of Kansas was equally cognizant of the law of our land when it endorsed and even expanded upon this policy of public access to the Kansas judicial

process by enacting Kansas Supreme Court Rule 7.04 to assure that no decisions of any high Court of Kansas would escape public scrutiny unless "no new points of law making the decision of value as precedent are believed to be involved", and by providing an avenue for correction through motion to the Court for "[a] party or other interested person who believes that an opinion of either the Supreme Court or Court of Appeals which is not designated by the court for publication meets the standards for publication established by this rule or otherwise has substantial precedential value." *Kansas Supreme Court Rule 7.04*

Nonetheless, when confronted with the clear constitutional implications of the decision of the Court of Appeals in this case, which were first raised by the Court of Appeals and *not* this petitioner, the Kansas Supreme Court chose not to publish the decision. To do otherwise would have necessitated dealing with the torrent of appeals which would have flooded Kansas Courts from each and every defendant who's sentence has been enhanced or affected by the law which the Kansas Court of Appeals has declared violative of "the prohibition against ex post facto laws" and "due process rights." The Kansas Supreme Court was mandated by statute to choose between two mutually exclusive alternatives, and answered "neither".

In *Richmond Newspapers*, this Court foretold the coming of this paradox, facilitated as it was by restriction of public access to judicial proceedings. The Richmond Court stated that "what is crucial in individual cases is whether access to a particular government process is important in terms of that very process." *Id* at 589. The unlawful and unconstitutional refusal of the Kansas Courts to either publish this decision or overturn it permitted them at once to maximize the use of a Kansas Statute for conflicting, solely prosecutorial ends which could not possibly have

coexisted if the "access" to this "particular government process" required under Kansas Law and the United States Constitution had been permitted.

The departure of the Kansas Courts from the clear mandate of Kansas Statutes and Supreme Court Rules regarding publication has denied Brown the process he is guaranteed under Kansas Law, and therefore under the Fourteenth Amendment.

Similarly, the Court's refusal to publish violates the Fourteenth Amendment's guarantee of equal protection under the law. "Equal Protection . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." [*Evitts v. Lucey*, 469 U.S. 387, 405, 105 S.Ct. 830, 841, 83 L.Ed 2d 821 (1985).] All those convicted of recidivistic domestic battery in Kansas fall into such a class with respect to *K.S.A. 21-3412*. By treating this statute as unconstitutional for the purposes of denying appellate relief to Brown, while at the same time continuing to hold it constitutional and apply it statewide for the purposes of sentence enhancement for all other recidivistic domestic battery convictions *except* Brown's, the Kansas Courts have denied equal justice not only to Brown, but to all members of the class. Similarly, by continuing to apply the less stringent standard for ineffective assistance of counsel set forth by this Court in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984) and adopted by the State in *Chamberlain v. State*, 236 Kan. 650, 657, 694 P.2d 468 (1985) for the remainder of its citizens while applying to Brown a much more stringent standard which presumes the loss of his right to counsel if he does not object at the beginning of trial, the Kansas Courts implicate Equal Justice.

2. The Kansas Supreme Court's order denying a *pro se* appellant without the means to secure appellate counsel

the Review by Petition which is guaranteed to him as a matter of right under both the statutes of the State of Kansas and the published rules of the Kansas Supreme Court violates the Fifth and Fourteenth Amendment requirements of due process of law and the Fourteenth Amendment's requirement of equal protection.

The law of the state of Kansas provides that "[A]ny . . party [to a criminal case on appeal] may appeal to the Supreme Court as a matter of right in any case in which a question under the constitution of either the United States or the state of Kansas arises for the first time as a result of the decision of the court of appeals." *K.S.A. 22-3602(d)*

The rules of the Kansas Supreme Court provide as well that "any party may appeal as a matter of right from a final decision of the Court of Appeals in any case in which a question under the Constitution of either the United States or the State of Kansas arises for the first time as a result of the decision of the Court of Appeals." *Kansas Supreme Court Rule 8.03(e)(1)*

In the case at bar, the Kansas Court of Appeals placed the constitutionality of *K.S.A. § 21-3412* directly at issue by stating that its provisions, as it existed at the date of Mr. Brown's indictment on all counts, "do not apply in Brown's case". The Court's grounds in so finding were purely constitutional. The Kansas Court of Appeals stated "It would have been a violation of the prohibition against ex post facto laws and a violation of [Brown's] due process rights to sentence him on the second and third convictions as if his first conviction had occurred before he committed the second and third offenses." (a7). In so ruling, the Kansas Court of Appeals drew a constitutional due process line regarding the order in which convictions may be assessed relative to commission of offenses. The Court also raised ex post facto concerns.

Review of the statute shows that the ruling of the Court of Appeals invalidates, *in every case, K.S.A. 21-3412(4)(C)(iv)*, which states that, in determining whether a conviction is a first, second, third or subsequent conviction "it is irrelevant whether an offense occurred before or after conviction for a previous offense". Additionally, *K.S.A. 21-3412(4)(C)(iii)* is squarely at odds with the ex post facto concerns of the Court of Appeals in stating that "only convictions occurring in the immediately preceding five years *including prior to the effective date of this act* shall be taken into account . . ." (Emphasis Added)

This was the first constitutional challenge in Kansas history to *K.S.A. 21-3412*. Even absent the first printed word of Brown's petition for review, the ruling of the Court of Appeals had provided him with an appeal of right to the Kansas Supreme Court pursuant to *K.S.A. 22-3602(d)*.

This question of first impression raised yet another. Brown argued that the unconstitutionality of *K.S.A. 21-3412* did not defeat his constitutional right to a jury trial, since the maximum penalty authorized for a particular crime is important solely because it provides insight into the thinking of the legislature regarding the seriousness of a particular crime. *see Duncan v. Lousiana*, 391 US 145, 150 88 S. Ct. 1444, 1448, 20 L. Ed. 2d. 491 (1968); *Blanton v. North Las Vegas*, 489 U. S. 538, 541 (1989); *Lewis v. United States*, 518 U.S. 322, 328, 1996 S.Ct. 132 (1996)

In determining whether a crime is serious, the judiciary may not "substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task." *Blanton* at 541.

This as well was and remains an issue of first impression in Kansas. It is also an issue of first impression in this Court.

Additionally, the Court provided a new, higher standard for application in ineffective assistance of counsel cases which raised constitutional questions by stating "If Brown seriously objected to Hare's representation, then he should have made his objections at the beginning of the trial."

As Brown set forth both on petition for review and in his Motion to Publish, this ruling establishes new law and modifies both existing Kansas and Federal constitutional law. In addition to presuming acquiescence in the loss of fundamental rights through silence, it sets forth a new requirement to preserve an ineffective assistance of counsel defense. Brown contended that the new requirement was unconstitutional and irreconcilable with prior law. *see State v. Lowe*, 18 Kan. App. 2d. 72, 74, 847 P.2d 1334 (1993); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984); *Chamberlain v. State*, 236 Kan. 650, 694 P.2d 468 (1985).

This is the third of three constitutional questions arising for the first time as a result of the decision of the Kansas Court of Appeals which was raised by this defendant in his petition for review to the Kansas Supreme Court "as a matter of right pursuant to *K.S.A. 22-3602(d)* and pursuant to Supreme Court Rule 8.03." (a26)

Petitioner contends that denial of that appeal of right was a clear violation of his due process rights, and that it denied him the same access to the Courts that a more affluent defendant could have achieved given identical

merits voiced through counsel of notoriety. This court has long held that "there can be no equal Justice where the kind of an appeal a man enjoys depends on the amount of money he has." *Griffin v. Illinois* at 19.

In *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821, (1985), this court said:

> "[I]f a State has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," *Griffin v. Illinois*, 351 U.S., at 18, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution."
>
> "The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms."
>
> *Id* at 400

In *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539, 55 U.S.L.W. 4612 (1987), this Court recognized the practical limitations of providing Court appointed counsel to every indigent defendant at each stage of the appeal, and set minimum due process requirements for appeals:

> "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to

present his claims fairly in the context of the State's appellate process." *Citations Omitted* *Id* at 556 (Emphasis Added)

In *Rinaldi v. Yeager* , 384 U.S. 305, 86 S. Ct. 1497, 16 L. Ed. 2d 577, (1966), this Court made the now axiomatic statement:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Griffin v. Illinois*, 351 U.S. 12; *Douglas v. California*, 372 U.S. 353; *Lane v. Brown*, 372 U.S. 477; *Draper v. Washington*, 372 U.S. 487 *Id* at 310

It is a sad yet unavoidable situation when a defendant without sufficient means is unable to negotiate the hurdles of the appellate process because he cannot "duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction." But what happened here is anything but unavoidable. This petitioner, requesting neither court appointed counsel nor state help, merely sought to "present his claims fairly in the context of the State's appellate process", only to see the Courthouse doors slammed shut as he arrived.

Even if we accept, without argument and as uncontroverted fact, that the great majority of such *pro se* filings are frivolous and tacitly unfit to further subtract from the Court's already over-taxed time, our Constitution still prohibits arbitrary dismissal unrelated to the merits of such

filings where review is non-discretionary. To hold to the contrary is to deny equal access to the Courts to all who cannot afford to purchase, even if only for publication upon brief, the name of a member of the bar. Here, as in *Evitts*, "[e]qual protection concerns are involved because the State treated a class of defendants -- indigent ones -- differently for purposes of offering them a meaningful appeal." (*Evitts v. Lucey*, 469 U.S. at 405)

Denial of Brown's review as a matter of right is an "unreasoned distinction" which violates not only the laws of the State of Kansas and the rules of the Supreme Court of Kansas, but also his Fourteenth Amendment rights to due process and equal protection.

3. The requirement promulgated within the Court of Appeals' opinion that an accused personally object to his attorney's representation at the beginning of a trial in order to preserve the issue of ineffective assistance of counsel violates the Sixth Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment and this Court's prohibition against presumption of acquiescence in the loss of fundamental rights

The Court of Appeals stated on Page 5 of its decision, "If Brown seriously objected to Hare's representation, then he should have made his objections at the beginning of the trial." This statement presumes that, though his silence, Mr. Brown gave up his right to the effective assistance of counsel for his defense. Such a presumption of acquiescence in the loss of fundamental rights overturns decades of Federal Constitutional law.

"It has been pointed out that courts indulge every reasonable presumption against

> waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. (Citations Omitted)" *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)

The Court of Appeals' conclusion here that acquiescence to the loss of competent representation may somehow be presumed from a defendant's silence presumes acquiescence in the loss of fundamental rights and therefore violates the sixth amendment to the United States Constitution as applied to the states through the Fourteenth amendment. This requirement is also unreasonable on its face insofar as it does not consider that the majority of trial counsel's shortcomings at trial were discovered only through Mr. Hare's testimony at a postconviction proceeding long after the trial itself was over, for it requires a defendant to object to circumstances of which he is not yet aware in order to preserve his right to the effective assistance of counsel. In order to preserve the right to effective assistance of counsel under this ruling, every defendant would have to alienate his attorney before trial by objecting to that attorney's representation.

This requirement is, as well, a drastic departure from this Court's interpretation of the Sixth Amendment's guarantee to the right of effective assistance of counsel. Through application of this new standard, exclusively to petitioner, the Kansas Court of Appeals was able to sidestep Strickland's mandates that counsel have "certain basic duties", including a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process", "a duty of loyalty, a duty to avoid conflicts of interest", a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary", and "the overarching duty to advocate the defendant's cause and the more particular

duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *See Strickland v. Washington*, 466 US 668, 688 (1984). Additionally, the Kansas Courts were able to forego application of the special standards for conflict of interest and constructive denial of counsel which were laid down for this nation by this Court in *Cuyler v. Sullivan* , 446 U.S. 335, 349-350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) and *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984), respectively based upon this new standard.

The State Courts are not empowered to so adopt arbitrary and unconstitutional standards for selective application. Petitioner should have been entitled to the protections of *Strickland v. Washington*, *Cuyler v. Sullivan* and *United States v. Cronic*. This ruling, if upheld, renders the pronouncements of this Court meaningless if contested by the highest Court of any of the several states, so long as those State Court rulings are secretly and selectively applied.

CONCLUSION

In 1958, this Court was confronted with the opposition of the highest executive and legislative powers of the state of Arkansas to its constitutional mandates in *Brown v. Board of Education*, 349 U.S. 294. This Court said then:

> [T]he interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and

judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution."

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: 'If . . . the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.'" (Citations Omitted)

Cooper v. Aaron, 358 U.S. 1, 18, 78 S. Ct. 1401, 1410, 3 L. Ed. 2d 5 (1958)

Petitioner begs this Court to extend its *Cooper* ruling to the highest Courts of the several states. There can be no Court decisions that secretly strike down a statute as unconstitutional. There must be equal application of the same law to all defendants, and no agent of any state, including its Supreme Court, may deny due process of or equal protection under the law to any criminal accused. Petitioner respectfully requests this Court grant his Petition for Writ of Certiorari.

Dated: March 20, 2000

Respectfully Submitted,

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NOT DESIGNATED FOR PUBLICATION

No. 80,014

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

STATEOF KANSAS,
Appellee,

v.

ROBERT M. BROWN,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; STEPHEN R.TATUM, judge. Opinion filed August 13, 1999. Affirmed.

Robert M. Brown, appellant pro se.

Steven J. Obermeier, assistant district attorney, and *Carla J. Stovall*, attorney general, for appellee.

Before, BRAZIL, C.J., KNUDSON, J., and JAMES P. BUCHELE, District Judge, assigned.

Per Curiam: Robert M. Brown appeals his convictions for three counts of battery, class B misdemeanors, in violation of K.S.A. 21-3412. Brown argues there was insufficient evidence to support his convictions, that he was denied effective assistance of counsel and/or constructively denied the assistance of counsel, and that he was denied the right to a jury trial. We disagree and affirm.

The detailed facts of the case are well known to the parties and will be set forth herein only as is necessary for an understanding of our decision.

Sufficiency of Evidence

Brown would like this court to weigh the evidence and find he was not guilty of the crimes charged. We simply cannot do that under our standard of review. When the sufficiency of the evidence is challenged, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Claiborne*, 262 Kan. 416, 425, 940 P.2d 27 (1997). Further, our function of appeal is not to reweigh the evidence or determine the credibility of the witnesses. Such functions are clearly left to the finder of fact. See *State v. Johnson*, 258 Kan. 475, 483-84, 905 P.2d 94 (1995).

In this case, Brown dissects the trial court's verdict in an attempt to demonstrate how he was wrongly convicted. The trial court correctly set for the the dilemma created by the evidence. As factfinder, the court had to decide whether to believe RKG's recanted tetimony at trial or give credence to the police reports she made at the time of each incident and the corroborating testimony of the police officers. The court found the latter more credible.

We have reviewed the record and find that Brown's convictions are supported by sufficient evidence.

Stacking of Presumptions

Brown next contends that the trial court violated the doctrine of improper stacking of inferences or presumptions. The court in *State v. Doyle*, 201 Kan. 469, 488, 441 P.2d 846

(1968), explained that the prohibition against stacking of inferences is a way of requiring that each element of the crime be supported by evidence of sufficient content and strength to prove it beyond a reasonable doubt. The court noted: "Presumption and inferences may be drawn only from facts established, and presumption may no rest on presumption or inference on inference." 201 Kan. at 488. This case does not involve an impermissible stacking of inferences or presumptions unreasonably drawn from the evidence presented. Rather, this case involves a conviction based on direct evidence of the victim shortly after the commission of a crime and the corroborating testimony of the police officers who responded on the scene.

Effectiveness of Counsel

Next, Brown argues he was denied effective assistance of counsel.

Brown sets forth a list of 9 factors demonstrating how the conduct of his pretrial attorney, Kevin Moriarty, did not fall within the wide range of professional assistance presumed of an attorney's performance. He then argues the substitution of Ryan Hare, an attorney from Moriarty's law firm, as counsel on the day of trial, amounted to ineffective assistance of counsel or, alternatively, a complete denial of counsel. Third, Brown contends he was denied the effective assistance of counsel when no investigation or preparation was taken by any partner, member or associate of the Moriarty firm prior to the morning of trial. Last, Brown claims Moriarty's acquiescence to the State's K.S.A. 60-455 motion and the agreement to have a fourth battery count set for trial at the same time was ineffective assistance of counsel and also that Moriarty worked under a conflict of interest which adversely affected his performance.

We agree with the district court that Moriarty's actions throughout the case were consistent with his trial

strategy. Trial strategy and tactics depend in great measure on the discretion and judgment as well as the expertise of the trial counsel. See State v. Pencek, 224 Kan. 725, 728-29, 585 P.2d 1052 (1978); Tuscano v. State, 206 Kan. 260, 262, 478 P.2d 213 (1970). Trial strategy is left up to the attorney. State v. Smith, 16 Kan. App. 2d 478, 482, 825 P.2d 541 (1992)

The obvious defense goal was to have RKG testify in Brown's favor, to have her testify that none of the incidents occurred, and to admit that she lied in the police reports. Moriarty was successful in executing this strategy as RKG completely recanted all of her statements to the police.

When the effectiveness of counsel is raised, the courts do not seek to determine if an attorney used the best trial strategy but if the strategy used was a reasonable trial strategy. The trial court found the strategy of the recanting victim was not unreasonable, and we agree. Further, it was also not unreasonable, in the context of the 60-455 motion, to consolidate all the charges into one trial in order for Brown to benefit from RKG's testimony that Brown was innocent and to oblige Brown's wishes to hurry the case along so he could kick RKG out of his house. The trial court found the strategy was not unreasonable. We agree.

Brown complains that he was prejudiced by the substitution of Hare as trial counsel on the day of trial. The record supports the trial court's conclusion that Hare was not unfamiliar with the domestic relationship of Brown and RKG, e.g., that he "did not take over the file with a paucity of information about the case." The court also stated that Hare did an effective job in attacking RKG's credibility and even Brown's new counsel at the motion for new trial conceded that Hare did a great job under the circumstances. Also, we find nowhere in the record did Brown object to Hare's representation of him at trial. If Brown seriously objected to Hare's representation, then he should have made his objections at the beginning of the trial.

The trial court found that failure to call additional witnesses to impeach the credibility of RKG would not have benefited Brown. We concur and further note that Hare effectively cross-examined RKG and did raise issues about her credibility.

We also do not find Moriarty was acting under a conflict of interest that affected the adequacy of his representation. Brown cites KRPC Rule 1.7(b) (1998 Kan. Ct. R. Annot. 313), which provides that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

The defense needed RKG to recant her testimony. Moriarty testified that if he had been trial counsel, there were three reasons why he would not have aggressively attempted to impeach RKG. First, the defense wanted her to remain on their side. Second, RKG had already impeached herself by recanting her previous testimony. Last, Moriarty stated there was no use in beating up on RKG because she already had a lot of problems. Brown focuses solely on this las reason. He argues Moriarty's comments clearly demonstrate that Moriarty was not representing his client's best interests since he would not impeach RKG. We disagree. Moriarty provided strategic reasons why he would not aggressively impeach RKG.

The ultimate question in this case falls under the second prong of our examination of whether counsel's alleged deficient performance prejudiced the defendant such that absent the errors, the result of the proceeding would have been different. It's hard to image a different result in this case. The trial court had to judge the credibility of RKG's trial testimony versus the credibility of the police reports completed at the time of the incidents and the

testimony of the police officers who witnessed the aftermath of the crimes. Had all Brown's cases not been consolidated, had further preparation and investigation occurred, had the court permitted admission of the evidence complained of at the motion for a new trial, and had Moriarty tried the case, there is not a reasonable probability that the outcome of the proceedings would have been different. It's virtually impossible to discredit a victim's previous testimony any further than having the victim testify at trial that the defendant was not the perpetrator and that the victim lied in the police reports.

We have often stated that much deference and reliance must be placed upon the wisdom and determination of the trial judge who saw all of the proceedings first hand as they happened. *Chamberlain v. State*, 236 Kan. 650m 659-60, 694 P.2d 468 (1985). We agree with the trial court in denying Brown's claims for a new trial based on allegations of ineffective assistance of counsel.

Jury Trial

Brown's final issue is that he was denied the right to a trial by jury.

The trial of misdemeanor cases shall be to the court unless a jury trial is requested in writing by the defendant. See K.S.A. 1998 Supp. 22-3404(1). However, a person charged with two or more petty offenses arising out of the same act, transaction, or occurrence, is entitled to a trial by jury when the potential aggregate penalty on all couts is in excess of 6 months' imprisonment. See *United States v. Potvin*, 481 F.2d 380, 381 (10th Cir. 1973)

Brown did not have a constitutional right to a jury trial. He was charged with four counts of domestic battery, pursuant to K.S.A. 21-3412, and the penalty section of K.S.A. 21-48502(1)(b). Each battery count was a class B

misdemeanor under K.S.A. 21-3412 with a maximum sentence under K.S.A. 21-4502(1)(b) of 6 months in the county jail. When the offenses arise out of separate acts or occurrences, the defendant cannot simply aggregate them because they were charged in the same complaint. See *State v. Bell*, 258 Kan. 123, 128, 899 P.2d 1000 (1995). These four counts of battery involved four separate incidents on different days.

Brown argues this court should apply the Kansas Legislature's 1996 amendments to K.S.A. 21-3412 which enhanced the penalties for subsequent convictions of domestic battery. A first conviction of domestic battery remained a class B misdemeanor with a maximum sentence of 6 months' incarceration. However, a second conviction of domestic battery carried a classification as a class A misdemeanor with a maximum sentence of 1 year incarceration and a third conviction was a felony with a maximum sentence also of 1 year incarceration. See K.S.A. 1998 Supp. 21-3412(c).

The 1996 amendments to K.S.A. 21-3412 do not apply in Brown's case. At the time he was charged with all of the counts of battery, he did not have any previous convictions. It would have been a violation of the prohibition against ex post facto laws and a violation of his due process rights to sentence him on the second and third convictions as if his first conviction had occurred before he committed the second and third offenses. *See, e.g., Crane v. Mitchell County U.S.D. no. 273*, 232 P.2d 205 (1982); *Garner v. Nelson*, 25 Kan. App. 2d 394, 398, 963 P.2d 1242 (1988). Consequently, the maximum penalties did not exceed the 6-month threshold, and Brown had no constitutional right to a jury trial. We also find no error in the trial court's determination that Brown had the advice of counsel regarding a jury trial, and there was no evidence that he ever asked for a jury trial.

Affirmed.

SUPREME COURT ORDER DISTRICT CASE NO. 96DV290+

IN THE SUPREME COURT

OF THE STATE OF KANSAS

ROBERT M. BROWN PRO SE
6200 W. 74TH ST
OVERLAND PARK KS 66204

STATE OF KANSAS, APPELLEE,
V NO. 1997-80014-
AS
ROBERT M. BROWN, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

LETTER REGARDING PETITION FOR REVIEW BY APPELLANT, ROBERT M. BROWN, PRO SE.
CONSIDERED BY THE COURT AND DENIED.

ADDITIONAL DISTRICT COURT CASE NO. 96DV740

DATE: 12/21/1999

CAROL C. GREEN
CLERK

Appendix To Petition for Writ of Certiorari
Order Denying Appeal of Right

SUPREME COURT ORDER DISTRICT CASE NO. 96DV290+

IN THE SUPREME COURT

OF THE STATE OF KANSAS

ROBERT M. BROWN
6200 W. 74TH ST
OVERLAND PARK KS 66204

PRO SE

STATE OF KANSAS, APPELLEE,
V
AS
ROBERT M. BROWN, APPELLANT.

NO. 1997-80014-

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY ROBERT BROWN.
CONSIDERED BY THE COURT AND DENIED.

ADDITIONAL DISTRICT COURT CASE NO. 96DV740

DATE: 11/09/1999

CAROL C. GREEN
CLERK

SUPREME COURT ORDER DISTRICT CASE NO. 96DV290+

IN THE SUPREME COURT

OF THE STATE OF KANSAS

ROBERT M. BROWN PRO SE
6200 W. 74TH ST
OVERLAND PARK KS 66204

STATE OF KANSAS, APPELLEE,
V NO. 1997-80014-
AS
ROBERT M. BROWN, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR PUBLICATION BY APPELLANT, ROBERT M. BROWN. CONSIDERED BY THE COURT AND DENIED.

ADDITIONAL DISTRICT COURT CASE NO. 96DV740

DATE: 11/09/1999

CAROL C. GREEN
CLERK

Constitutional Provisions Involved

U.S. Constitution: Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution: Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Constitution: Fourteenth Amendment, Section One

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

K.S.A. § 21-3412

Chapter 21.–CRIMES AND PUNISHMENTS
PART II.–PROHIBITED CONDUCT
Part 2.–Prohibited Conduct
Article 34.–CRIMES AGAINST PERSONS

21-3412. Battery.

(a) Battery is:

(1) Intentionally or recklessly causing bodily harm to another person; or

(2) intentionally causing physical contact with another person when done in a rude, insulting or angry manner.

(b) Except as provided in subsection (c), battery is a class B person misdemeanor.

(c) (1) Upon a first conviction of a violation of this section under circumstances which constitute a domestic battery, a person shall be guilty of a class B person misdemeanor and sentenced to not less than 48 consecutive hours nor more than six months' imprisonment and fined not less than $200, nor more than $500 or in the court's discretion the court may enter an order which requires the person enroll in and successfully complete a domestic violence prevention program.

(2) If, within five years immediately preceding commission of the crime, a person is convicted of a violation of this section a second time under circumstances which constitute a domestic battery, such person shall be guilty of a class A person misdemeanor and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $500 nor more than $1,000. The five days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours'

imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program. The person convicted must serve at least five consecutive days' imprisonment before the person is granted probation, suspension or reduction of sentence or parole or is otherwise released. As a condition of any grant of probation, suspension of sentence or parole or of any other release, the person shall be required to enter into and complete a treatment program for domestic violence prevention.

(3) If, within five years immediately preceding commission of the crime, a person is convicted of a violation of this crime a third or subsequent time under circumstances which constitute a domestic battery, such person shall be guilty of a person felony and sentenced to not less than 90 days nor more than one year's imprisonment and fined not less than $1,000 nor more than $2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days' imprisonment. The court may also require as a condition of parole that such person enter into and complete a treatment program for domestic violence. The 90 days' imprisonment mandated by this subsection may be served in a work release program only after such person has served 48 consecutive hours' imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program.

(4) As used in this section:

(A) Domestic battery means a battery against a family or household member by a family or household member;

(B) family or household member means persons 18 years of age or older who are spouses, former

spouses, parents or stepparents and children or stepchildren, and persons who are presently residing together or who have resided together in the past, and persons who have a child in common regardless of whether they have been married or who have lived together at any time. Family or household member also includes a man and woman if the woman is pregnant and the man is alleged to be the father, regardless of whether they have been married or have lived together at any time; and

(C) for the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing under this section:

(i) "Conviction" includes being convicted of a violation of this section or entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings on a complaint alleging a violation of this section;

(ii) "conviction" includes being convicted of a violation of a law of another state, or an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits or entering into a diversion or deferred judgment agreement in lieu of further criminal proceedings in a case alleging a violation of such law, ordinance or resolution;

(iii) only convictions occurring in the immediately preceding five years including prior to the effective date of this act shall be taken into account, but the court may consider other prior convictions in determining the sentence to be imposed within the limits provided for a first, second, third or subsequent offender, whichever is applicable; and

(iv) it is irrelevant whether an offense occurred before or after conviction for a previous offense.

History: L. 1969, ch. 180, § 21-3412; L. 1992, ch. 298, § 11; L. 1993, ch. 291, § 27; L. 1996, ch. 211, § 4; L. 1996, ch. 258, § 13; July 1.

K.S.A. § 22-3602

Chapter 22.–CRIMINAL PROCEDURE
KANSAS CODE OF CRIMINAL PROCEDURE
Article 36.–APPEALS

22-3602. Appeals by defendant, when; appeals by prosecution; transfers to supreme court.

(a) Except as otherwise provided, an appeal to the appellate court having jurisdiction of the appeal may be taken by the defendant as a matter of right from any judgment against the defendant in the district court and upon appeal any decision of the district court or intermediate order made in the progress of the case may be reviewed. No appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or *nolo contendere*, except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. 60-1507 and amendments thereto.

(b) Appeals to the court of appeals may be taken by the prosecution from cases before a district judge as a matter of right in the following cases, and no others:
   (1) From an order dismissing a complaint, information or indictment;
   (2) from an order arresting judgment;
   (3) upon a question reserved by the prosecution; or
   (4) upon an order granting a new trial in any case involving a class A or B felony or for crimes committed on or after July 1, 1993, in any case involving an off-grid crime.

(c) Procedures for appeals by the prosecution enumerated in subsection (b) shall be as provided in supreme court rules.

(d) Appeals to a district judge may be taken by the prosecution from cases before a district magistrate judge as a matter of right in the cases enumerated in subsection

(b) and from orders enumerated in K.S.A. 22-3603 and amendments thereto.

(e) Any criminal case on appeal to the court of appeals may be transferred to the supreme court as provided in K.S.A. 20-3016 and 20-3017, and amendments thereto, and any party to such case may petition the supreme court for review of any decision of the court of appeals as provided in subsection (b) of K.S.A. 20-3018 and amendments thereto, except that any such party may appeal to the supreme court as a matter of right in any case in which a question under the constitution of either the United States or the state of Kansas arises for the first time as a result of the decision of the court of appeals.

(f) For crimes committed on or after July 1, 1993, an appeal by the prosecution or the defendant relating to sentences imposed pursuant to a presumptive sentencing guidelines system as provided in K.S.A. 21-4701 *et seq.* and amendments thereto, shall be as provided in K.S.A. 21-4721 and amendments thereto.

History: L. 1970, ch. 129, § 22-3602; L. 1976, ch. 167, § 1; L. 1977, ch. 112, § 9; L. 1986, ch. 115, § 65; L. 1987, ch. 117, § 1; L. 1992, ch. 239, § 263; L. 1993, ch. 291, § 196; L. 1999, ch. 159, § 7; July 1.

KANSAS SUPREME COURT RULE 8.03(e)(1)

"*Review as a Matter of Right.* As provided by K.S.A. 60-2101(b) and K.S.A. 22-3602(d), any party may appeal as a matter of right from a final decision of the Court of Appeals in any case in which a question under the Constitution of either the United States or the State of Kansas arises for the first time as a result of the decision of the Court of Appeals."

K.S.A § 60-2106
Chapter 60.–PROCEDURE, CIVIL
Article 21.– APPEALS

60-2106. Appellate court decisions.

(a) *Opinions.* It shall be the duty of the judges of an appellate court to prepare and file with the papers in each case, the opinion of the court upon the questions of law arising in the case, within sixty (60) days after the decision of the same; and the opinion so filed shall be treated as a part of the record in the case, but no costs shall be charged therefor, except for copies thereof ordered by a party, and no mandate shall be sent to the court below, until the opinion provided for by this section has been filed. A memorandum opinion may be prepared in any case where no new question of law is decided or which is otherwise considered as having no value as a precedent. Such a memorandum opinion need not contain a syllabus or statement of facts. In all other cases a formal opinion shall be prepared.

(b) *Syllabus.* Each formal opinion shall contain a syllabus of the points of law decided, which shall be confined to those questions necessarily arising from the facts in the case.

(c) *Judgment and mandate.* The supreme court may by rule provide for post decision motions for rehearing or other relief. When under such rule a decision of an appellate court becomes final, such court shall promptly cause to be transmitted to the clerk of the district court its mandate containing such directions as are appropriate under the decision. A copy of the opinion of the court shall accompany and be a part of the mandate. The clerk of the district court shall make a notation thereof on the appearance docket. Such mandate and opinion, without further order of the judge, shall thereupon be a part of the judgment of the court if it is determinative of the action, or shall be controlling in the conduct of any further proceedings necessary in the district court.

Kansas Supreme Court Rule 7.04

Opinions of the appellate courts, whether signed or unsigned, shall be memorandum opinions or formal opinions according to the requirements of K.S.A. 60-2106.

Opinions shall be published in the official reports only when they satisfy the standards set out in this rule. Disposition by memorandum, without a formal published opinion, does not mean that the case is considered unimportant. It does mean that no new points of law making the decision of value as precedent are believed to be involved.

An opinion shall be prepared in memorandum form unless it:

(a) Establishes a new rule of law or alters or modifies an existing rule;
(b) Involves a legal issue of continuing public interest;
(c) Criticizes or explains existing law;
(d) Applies an established rule of law to a factual situation significantly different from that in published opinions of the courts of this state;
(e) Resolves an apparent conflict of authority; or
(f) Constitutes a significant and non-duplicative contribution to legal literature;
    (1) by an historical review of law; or
    (2) by describing legislative history

A memorandum opinion shall not be published unless there is a separate concurring or dissenting opinion in the case, and the author of such separated opinion requests that it be reported; or unless it is ordered to be published by the Supreme Court.

A party or other interested person who believes that an opinion of either the Supreme Court or Court of Appeals

which is not designated by the court for publication meets the standards for publication established by this rule or otherwise has substantial precedential value may file a motion in the Supreme Court asking that it be published. The motion shall state the grounds for such belief, shall be accompanied by a copy of the opinion, and shall comply with Supreme Court rule 5.01 except that service shall not be required.

Regardless of the foregoing, no opinion superceded by an opinion on rehearing shall be published. An opinion that is modified on rehearing shall be published as modified if it otherwise meets the standards of this rule.

A formal opinion shall be written and published only if the majority of the justices or judges participating in the decision find that one of the standards set out in this rule is satisfied. The court or panel which decides the case shall make a tentative decision whether or not a formal opinion is required before or at the time the writing assignment is made. Concurring and dissenting opinions shall be published only if the majority opinion is published.

All memorandum opinions, unless otherwise required to be published, shall be marked; "Not Designated for Publication." Since unpublished opinions are deemed without value as precedent and are not uniformly available to all parties, opinions so marked shall not be cited as precedent by any court or in any brief or other material presented to any court, except to support a claim of res judicata, collateral estoppel, or law of the case.

Robert M. Brown
6200 W. 74th Street
Overland Park, KS 66204
(816) 805-8093

November 16, 1999

Chief Justice Kay McFarland
Justice Tyler C. Lockett
Justice Donald L. Allegrucci
Justice Fred N. Six
Justice Bob Abbott
Justice Robert E. Davis
Justice Edward Larson
Carol C. Green, Clerk of the Supreme Court
Kansas Judicial Center, Room 374
301 S.W. 10th Avenue
Topeka, KS

Re: 97-80014 AS

Distinguished Members of the Court:

I write with the hope of enlisting your help in the correction of an oversight.

I have received your ruling, dated November 9, 1999 denying my petition to the Supreme Court of the State of Kansas for review in the above captioned case.

Review of the petition for review will show that it was taken as a matter of right pursuant to K.S.A. 22-3602(d) and pursuant to Supreme Court Rule 8.03. These rules provide in relevant part as follows:

"Any criminal case on appeal to the court of appeals may be transferred to the supreme court as provided in K.S.A. 20-3016 and 20-3017, and amendments thereto, and any party to such case may petition the supreme court for review of any decision of the court of appeals as provided in subsection (b) of K.S.A. 20-3018 and amendments thereto, except that *any such party may appeal to the supreme court as a matter of right in any case in which a question under the constitution of either the United States or the state of Kansas arises for the first time as a result of the decision of the court of appeals.*"

K.S.A. 22-3602(d) *(Emphasis Added)*

"*Review as a Matter of Right.* As provided by K.S.A. 60-2101(b) and K.S.A. 22-3602(d), any party may appeal as a matter of right from a final decision of the Court of Appeals in any case in which a question under the Constitution of either the United States or the State of Kansas arises for the first time as a result of the decision of the Court of Appeals."

Supreme Court Rule 8.03(e)(1)

In this case, three such questions arose a result of the decision of the Court of Appeals. Relevant excerpts from the petition are reproduced verbatim as APPENDIX A to this letter.

Each of the issues labeled A, B and C is indisputably a question under the Constitution of the United States, the State of Kansas, or both.

Regarding issue A, the petitioner addressed the contention of the Court of Appeals that literal application of K.S.A. 21-3412 for the purpose of sentence enhancement was not possible in his case because such application would be ex post facto and hence violate his due process rights. It is hard to image a construction of the Court of Appeals decision in this case under which no Constitutional question is raised. Further, there is no published case law in any Kansas Appellate Court which has challenged the constitutionality of K.S.A. 21-3412.

Regarding issue B, the petitioner addressed the Court of Appeals' contention that it is the maximum penalty which could be framed, and not the intent of the legislature, which controls in the determination of whether the defendant has a constitutional right to a jury trial where a statute which would otherwise permit potential imprisonment has been ruled unconstitutional. This is a question of first impression at both the Kansas and Federal level, and raises questions under both the Kansas and United States Constitutions.

Regarding issue C, the petitioner challenged the constitutionality of the Court of Appeals' requirement that an accused personally object to his attorney's representation at the beginning of a trial in order to preserve the issue of ineffective assistance of counsel as violative of the Sixth Amendment of the United States Constitution as applied to the states through the fourteenth amendment. This requirement, set forth as new law and without authority in the Opinion of the Court of Appeals, represents a drastic departure from the rules this Court adopted in Chamberlain. It also assumes acquiescence in the loss of fundamental rights. Since this requirement arose for the first time in either Kansas or Federal Court from the decision of the Court of Appeals in the case at bar, this constitutional issue must necessarily be an issue of first impression.

Three issues under the Constitution of either the United States, the State of Kansas, or both arise for the first time as a result of the decision of the Court of Appeals in this case. Denial of my Petition for Review is not within the lawful discretion of the Supreme Court of the State of Kansas under these circumstances. Denial violates K.S.A. 22-3602(d), Supreme Court Rule 8.03(e)(1), and my due process rights to "an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case." *Crane v. Mitchell County U.S.D. No. 273, 232 Kan. 51, 56, 652 P.2d 205 (1982).*

I ask that you grant my petition for review. It is a remedy I have by right under Kansas Law.

Thank you for your consideration of this matter.

Sincerely,

s/Robert M. Brown

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FILED
Nov 17 11:14 AM '99
CAROL C. GREEN
CLERK APPELLATE COURTS

s/11-17-99
s/Letter distributed to court.
s/Kg

No. 97-80014-A

IN THE
SUPREME COURT OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee,

vs.

ROBERT M. BROWN
Defendant-Appellant.

DEFENDANT-APPELLANT'S PETITION FOR REVIEW

I. REQUEST FOR REVIEW

The Defendant respectfully requests that this Court Review and reverse the decision of the Court of Appeals wherein the Court affirmed the Defendant's convictions of three counts of domestic battery. Issues A, B and C involve constitutional questions which arise here for the first time as a result of the decision of the Court of Appeals. This request is made as a matter of right pursuant to K.S.A. 22-3602(d) and pursuant to Supreme Court Rule 8.03.

II. DATE OF DECISION

The memorandum decision was filed August 13th, 1999.

III. ISSUES OF WHICH REVIEW IS SOUGHT

A. Whether the Court of Appeals correctly held that K.S.A. 21-3412(4)(C)(iii) and K.S.A. 21-3412(4)(C)(iv) are violative of due process rights and the prohibition against ex post facto laws and therefore unconstitutional.
B. Whether a judicial determination regarding the maximum punishment which may be constitutionally permitted by a statute can alter a legislative determination that a crime is serious in deciding whether a defendant has a constitutional right to Jury Trial.
C. Whether the requirement promulgated within the Court of Appeals' opinion that an accused personally object to his attorney's representation at the beginning of a trial in order to preserve the issue of ineffective assistance of counsel violates the Sixth Amendment of the United States Constitution.
D. Whether the Court of Appeals failed to apply the correct standard of review to the Defendant's claims of conflict of interest.
E. Whether the Court of Appeals improperly determined that Defendant's pre-trial counsel operated in pursuit of purposeful trial strategy despite overwhelming evidence to the contrary contained within the record.
F. Whether Court of Appeals erred in ruling that trial counsel was effective.
G. Whether the Court of Appeals failed to consider the Defendant's claims of constructive denial of counsel.

IV. STATEMENT OF FACTS

The facts of this case, although not dealt with in detail by the Court of Appeals, are dealt with at some length in the Brief of Appellant. Relevant excerpts are presented below, and facts of record are set forth as necessary within defendant's arguments.

This case involved four incidents of domestic battery alleged to have occurred against RKG. In each case, all evidence except the statement given to the police by RKG was entirely circumstantial. (R. V., 58-9, 69, 78, 83, 89, 101, 108)

In pre-trial proceedings, the defendant was represented by Kevin Moriarty. On August 12th, 1996 the State filed a Motion to Admit Evidence pursuant to K.S.A. 60-455 or in the alternative evidence of continuing course of conduct. (R. I, 2) Although the State advised Mr. Moriarty in open court that the motion was "pretty lengthy" (R. IV, 7-8), Mr. Moriarty did not file a responsive pleading. At the 60-455 hearing on 09/17/96, although the State had given Mr. Moriarty the option to dismiss and re-file all the charges (R. XVII, 31-32), he agreed without argument to have all counts combined. On 10/15/96, Mr. Moriarty offered no opposition to having an additional charge of domestic battery set for trial at the same time as the three other counts. (R. XIV, 3)

On the very morning of the trial, J. Ryan Hare was substituted as counsel for the defendant. Mr. Hare tried the case on 10/23/96. No defense was presented. (R V, 110) The trial court found the defendant guilty. The Court of Appeals affirmed.

V. ARGUMENTS AND AUTHORITIES

A. The Court of Appeals incorrectly held that K.S.A. 21-3412(4)(C)(iii) and K.S.A. 21-3412(4)(C)(iv) are violative of due process rights and the prohibition against ex post facto laws and therefore unconstitutional.

This question regarding the constitutionality of a Kansas Statute arises for the first time as a result of the decision of the court of appeals. The Court of Appeals, on page 8 of its opinion, stated as follows:

> "The 1996 amendments to K.S.A. 21-3412 do not apply in Brown's case. At the time he was charged with all of the counts of battery, he did not have any previous convictions. It would have been a violation of the prohibition against ex post facto laws and a violation of his due process rights to sentence him on the second and third convictions as if his first conviction had occurred before he committed the second and third offenses."

This opinion alters and modifies K.S.A. 21-3412, which states in relevant part that for the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing, that:

> "(O)nly convictions occurring in the immediately preceding five years *including prior to the effective date of this act* shall be taken into account . . ."
> K.S.A. 21-3412(4)(C)(iii) (Emphasis Added)
> "(I)t is irrelevant whether an offense occurred before or after conviction for a previous offense." K.S.A. 21-3412(4)(C)(iv)

As these provisions clearly permit the court to sentence a defendant on second and third convictions as if his first conviction had occurred before he committed the

second and third offenses, the ruling of the Court of Appeals in the above captioned case has adjudicated K.S.A. 21-3412(4)(C)(iii) and K.S.A. 21-3412(4)(C)(iv) violative of due process rights and the prohibition against ex post facto laws and therefore unconstitutional.

It is important to note that all of the four counts in this trial were charged after the July 1, 1996 effective date of the current version of K.S.A. 21-3412.

Defendant argues since the 1996 Amendments to K.S.A 21-3412 are remedial rather than punitive in purpose, that the law is not ex post facto. See State v. Myers, 260 Kan. 669 (1996). Further, even if the law is considered punitive rather than remedial, the alleged date of occurrence of the defendant's fourth charged count of domestic battery was after the 1996 amendment. Further, the defendant was convicted on the post-amendment charge at a time when he already had two prior convictions within five years. Thus, the defendant was potentially subject to a felony conviction on that count at the trial in question with a maximum penalty of one year's imprisonment. This is true even in the context of the most literal reading of the Constitution.

The defendant had a constitutional right to a jury trial.

B. It is unimportant whether or not a legislative determination regarding the maximum punishment which is authorized for a particular crime is constitutional in deciding whether a crime is so serious that the defendant has a constitutional right to Jury Trial.

The maximum penalty authorized for a particular crime is important solely because it provides insight into the thinking of the legislature regarding the seriousness of a particular crime.

In Duncan V. Lousiana, 391 US 145, 88 S. Ct. 1444, 20 L. Ed. 2d. 491 (1968), the Court stated:

> "[T]he penalty *authorized* for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. District of Columbia v. Clawans, 300 U.S. 617 (1937). The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," 300 U.S., at 628, of the crime in question. (Emphasis added). Duncan at 159-160

Further, it makes no difference how the offenses are charged or what penalties are carved out before trial. Our Courts have made clear that the judgment of the state or even of the Court may not be substituted for that of the legislature. A legislative determination of the seriousness of an offense, once made, is controlling.

> "The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task . ." Blanton v. North Las Vegas, 489 U. S. 538,541 (1989)

> "[W]e need not look to the punishment actually imposed, because we are able to discern Congress judgment of the character of the offense." Lewis v. United States, 518 U.S. 322, 328, 1996 SCT 132 (1996)

The law is clear. The court's determination as to the constitutionality of the statute is irrelevant for purposes of characterizing the defendant's offenses as to seriousness. By the standard set forth by our legislature in K.S.A. 21-3412,

this defendant was most certainly tried for serious offenses, and the judiciary may not "substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task." A judgment as to an entire segment of society's mores and morals may not be whisked away in a brief moment of technical enlightenment.

C. The requirement promulgated within the Court of Appeals' opinion that an accused personally object to his attorney's representation at the beginning of a trial in order to preserve the issue of ineffective assistance of counsel violates the Sixth Amendment of the United States Constitution.

The Court of Appeals stated on Page 5 of its decision, "If Brown seriously objected to Hare's representation, then he should have made his objections at the beginning of the trial."

> "The courts must indulge `every reasonable presumption against waiver' of the right to counsel, and will `not presume acquiescence in the loss of fundamental rights [i.e., the right to counsel].'" State v. Lowe, 18 K.A. 2.d 72, 74, 847 P.2d 1334 (1993) (Citations Omitted)
>
> "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. (Citations Omitted)" Johnson v. Zerbst, 304 U.S. 458, 464 (1938)

The Court of Appeals' conclusion here that acquiescence to the loss of competent representation may somehow be presumed from a defendant's silence presumes acquiescence in the loss of fundamental rights and therefore

violates the sixth amendment to the United States Constitution as applied to the states through the fourteenth amendment.

This requirement is also unreasonable on its face insofar as it does not consider that the majority of trial counsel's shortcomings at trial were discovered only through Mr. Hare's testimony at a postconviction proceeding long after the trial itself was over. It is an onerous burden indeed to require a defendant to object to circumstances of which he is not yet aware in order to preserve his right to the effective assistance of counsel.

D. The Court of Appeals failed to apply the correct standard of review to the Defendant's claims of conflict of interest.

The Court of appeals, in its determination that Mr. Moriarty had a sound base in hypothetical strategy for not impeaching a witness he neither examined nor cross-examined, failed to reach the proper question in its analysis of Mr. Moriarty's conflict of interest. The question is whether or not Moriarty's actual representation was affected.

The Court in Cuyler v. Sullivan, 1980.SCT.1599, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) established the standard for ineffective assistance in cases where defense counsel labors under a conflict of interest:

> "[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, at 487-491. But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of

ineffective assistance. See Glasser, supra, at 72-75."

Cuyler v. Sullivan, 1980.SCT.1599, 446 U.S. 335, 349-350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)

See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984).

Thus, when a defendant is able to demonstrate that his counsel actively represented conflicting interests and that as a result his representation was affected, he need not demonstrate prejudice in order to obtain relief.

In State v. Robert M. Brown, defense counsel stated on the record that he did not and would not pursue impeachment of the state's complaining witness because "[S]he has her own set of problems, too. There's no use beating up on somebody that clearly has a ton of problems." (R. XVII, 61) "[S]he is, by every standard, a pitiful sole. I mean, she can be very volatile, and everything. But she's got a ton of problems." (R. XVII, 63)

Defense counsel also testified that he took actions which were calculated to incriminate his own client because he was sympathetic to the state's complaining witness:

"Q: All right. So you made the legal decision that you would not honor his request to call a witness that he had asked you to call?

A: Yeah, because I already had a tape recording of Robin saying that she recanted everything. And I tape recorded that conversation. And in it - - to be honest with you, I thought that Bob may be trying to influence her and try to get her to avoid service. So what I did is, I asked her very

specifically, if Bob was trying to do that." (R. XVII, 27)

....

"A. Yeah. She was there. And I told her I was going to tape record the conversation, because my concern was that Bob had put her up to coming in." (R. XVII, 51-52)

There can be no question that the defendant's representation was affected. Mr. Moriarty, in his concern for the State's complaining witness, turned what should have been perceived by zealous defense counsel as a stellar opportunity to exonerate his client into a documented opportunity to inculpate the defendant in the crimes charged as well as other improprieties.

The record also shows that Mr. Moriarty refused to honor the Defendant's requests to subpoena witnesses (R. XVII, 27) and obtain police reports regarding lies to the police and violent attacks against the defendant by RKG (R. XVII, 71). When the defendant attempted to hire an expert to unearth some of the psychological aspects of RKG's condition, Mr. Moriarty refused to cooperate and dismissed his client's wish to present a theory of defense as "bullshit". (R. XVII, 48)

Mr. Moriarty *admitted* a conflict of interest on multiple occasions. (R. XVII, 51-52; R. XVII, 61; R. XVII, 63) And Mr. Moriarty stated in testimony that his sympathies for the state's complaining witness affected his actions. He not only failed to pursue investigation which could impeach the state's complaining witness, but also undertook action which was calculated to incriminate his own client and to hinder the defendant's attempts to frame a theory of defense for himself. In the case of this defendant, it is clear "that a conflict of interest actually affected the adequacy of his representation" and that this defendant "need not demonstrate prejudice in order to obtain relief."

The Court of Appeals considered neither the appropriate facts nor the appropriate standard in its decision.

E. The Court of Appeals improperly determined that Defendant's pre-trial counsel operated in pursuit of purposeful trial strategy despite overwhelming evidence to the contrary contained within the record.

The Court of Appeals opined that it was "not unreasonable, in the context of the 60-455 motion, to consolidate all of the charges into one trial in order for Brown to benefit from RKG's testimony that Brown was innocent and to oblige Brown's wishes to hurry the case along so he could kick RKG out of his house. The trial court found the strategy was not unreasonable. We agree."

Mr. Moriarty did in fact testify at a postconviction proceeding that with regard to the 60-455 motion which was heard on 09/17/96, although the State had given him the option to dismiss and re-file all the charges (R. XVII, 31-32), he made a strategic decision to have all counts combined because the defendant and RKG were "getting along fine" and the strategy was to "keep the peace in the home" until after the trial so he could kick RKG out of his house after she testified favorably in his behalf. Mr. Moriarty also testified that he knew RKG's story would change to the defendant's detriment "if he booted her out of the house."

The 60-455 hearing took place on 9/17/96. (R. III, 2) The record in this case clearly shows there was no peace in the home to keep and Mr. Moriarty knew it. Mr. Brown had been arrested and incarcerated only two days before this hearing on another accusation of domestic battery by RKG, and he was arraigned only the prior day at a hearing at which RKG did not appear. (R. III, 1-6) There was a no contact order in effect between the two parties. (R., III, 7) Further, on this date Mr. Moriarty personally served RKG in

his capacity as Mr. Brown's attorney in the civil case between the parties with an order permanently evicting RKG from the defendant's home. (R. III, 7)

Mr. Moriarty described the then prevailing situation best in his own words: "And its a - - for lack of a better term - - it's just a nightmare type situation" (R. III, 2, lines 12-13); "It's a terrible situation for both of these people in the home." (R. III, 2-3)

Keep in mind, these statements were made *at and during* the 60-455 hearing by Mr. Moriarty himself.

Further, if acquiescing to the combination of several counts with a view to "hurry the case along so he could kick RKG out of his house" was truly the strategy, why then did Mr. Moriarty kick RKG out of the house personally and on the record in this case at the same hearing where such acquiescence took place?

Similarly, the "strategy of the recanting victim" with which Mr. Moriarty is credited by the Court of Appeals should be reconsidered in light of Mr. Moriarty's own testimony at the motion for new trial:

> "What Bob wanted then was to get this case over with, because what he wanted to do is get this behind him so he could boot her out of the house immediately afterwards. And he didn't want to screw up anything while she was still in the house, because he knew, *just as I knew*, that if he booted her out of the house, her story was going to change again." (R. XVII, 31-32)(Emphasis Added)

If Mr. Moriarty truly believed the words he imparted to the district court, then in his own mind he assured that RKG would turn on the defendant by kicking her out of the

home at the 60-455 hearing. He could not have believed in the "strategy of the recanting victim" at trial more than a month later.

F. The Court of Appeals' ruling that counsel was effective conflicts with existing authority and should be reviewed.

J. Ryan Hare, substituted by his firm as counsel in this case, was the firm's most junior associate. Mr. Hare admitted in testimony that he did not have a trial knowledge of the case. (R. VI, 27) Mr. Hare testified he did not know who the witnesses were or who they might be. (R. VI, 7) Mr. Hare testified he had been sworn in as a lawyer less than two month's prior to the trial. (R. VI, 5) He had not reviewed the police reports prior to the morning of the trial. (R VI, 6-7) He did not know until the morning of trial that he would be trying the case (R. VI, 7-8), and did not take the case file home with him the night before the trial because the file was still in Mr. Moriarty's possession. (R. VI, 8)

Mr. Hare testified that his first opportunity to prepare came hours before the trial. (R. VI, 8) He had documents that could show that the victim had undertaken to defraud a civil court in concert with her domestic violence complaints (R. XII, Defendant's Exhibit A-2/14/97) in his possession at the trial (R. VI, 10). Mr. Hare testified that he and the Defendant had discussed using the documents in the Defendant's defense (R. VI, 12), and Mr. Hare testified that these documents would have been important to bring to the Court's attention (R. VI, 23). Nonetheless, these records were never produced by trial counsel during the proceeding. (R. V, 110; 1-123)

Mr. Hare testified that he would have had no time to call witnesses or produce exhibits of evidence before the trial, and that production of these items was clearly his

responsibility as the attorney in charge of the case. (R. VI, 27)

In testimony, Mr. Hare admitted numerous shortcomings and made no excuses. He testified that he had acted in ways which were contrary to his beliefs regarding strategy (R. VI, 23), and made no attempt at hypothesizing a strategy which could justify his appearance in the case without the requisite knowledge to try it. Further, even if Mr. Moriarty's assertions as to strategy are to be believed, they cannot be attributed to Mr. Hare because Mr. Moriarty has testified he never sat down with Mr. Hare to discuss strategy in the case. (R. XVII, 45)

The Court of Appeals found no prejudice to the defendant, stating:

> "It's virtually impossible to discredit a victim's previous testimony any further than having the victim testify at trial that the defendant was not the perpetrator and that the victim lied in the police reports."

The Court misses the point. Both the prosecution and the defense were in the same precarious position. Each side was faced with the onus of trying to build a case using the statements of an admitted liar as the fundamental building block of that case.

In such circumstances, it becomes important to try to build a *context* around those statements using independent, circumstantial corroboration. The prosecution launched a zealous campaign to that end.

The defendant's counsel had documents and evidence available that indicated RKG had lied to police on multiple prior occasions and had defrauded both the courts and the police in concert with her domestic violence

complaints (R. XVII, 71; Additions to Record, 12/20/94 Police Report; R. XII, Defendant's Exhibit E), but was not well versed enough in the facts of the case to use them. The defendant had informed his counsel of the availability of numerous witnesses (R. XVII, 69), but counsel refused to call them. The defendant had "begged" his counsel to obtain police reports showing that RKG had kicked in his front door while he was inside his own home, and then made false allegations of domestic violence to the unbelieving police when they arrived and arrested her, but counsel refused to obtain it. (R. XVII, 71) The defendant had retained an expert who was willing to shed light on the psychological underpinnings of RKG's conduct, but was told by his counsel his request to use expert testimony was "bullshit". (R. XVII, 48)

The Court of Appeals has ruled, in essence, that no amount of contextual framework could have given more credence to the defendant's account of the facts. And it has so ruled without specific consideration of even one of the defendant's many foregone opportunities to build support for the position that RKG's testimony at trial was more likely true than her statements to the police. When trial rolled around, the prosecution had a liar, a context, and a parade of witnesses presenting circumstantial testimony. The defendant just had a liar.

> "The United States Supreme Court has recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" State v. Humphrey, 252 Kan 6, 17, 845 P.2d 592 (1992) (Citations Omitted)

> "In a criminal prosecution, a defendant is entitled to present the theory of his or her defense. It is fundamental to a fair trial to

> allow a defendant to present his or her version of the events so that the jury may properly weigh the evidence and reach its verdict." State v. Mays, 254 Kan. 479, Syl at #1, 866 P.2d 1037 (1994)

Certainly this defendant was prejudiced by his own defense counsel's interference with his ability to assert his fundamental rights.

G. The Court of Appeals failed entirely to consider the Defendant's claims of constructive denial of counsel.

The State in its brief gave no consideration to and offered no argument regarding the defendant's claims that he was constructively denied the assistance of counsel both at the 60-455 hearing and at the trial itself. The Court of Appeals followed suit and failed entirely to address these issues in its ruling.

> "There are circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." United States v. Cronic, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984)

> "Circumstances . . . may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. Powell v. Alabama was such a case." Cronic at 659

The defendant argues that, by failing to file a responsive pleading, by failing to give argument, by failing to accept the State's offer to dismiss the charges and re-file, and by agreeing to combination of all counts with neither opposition nor a viable strategy for lack thereof, Mr. Moriarty failed to subject the prosecution's case to meaningful adversarial testing at the 60-455 hearing, which was a critical stage of the proceedings.

Similarly, the defendant notes that Mr. Hare was pulled by his superiors from the supporting cast and thrust into the mix without a trial knowledge of the case, without strategic consultation from pretrial counsel, without knowledge of who the witnesses were or might be, without an opportunity to prepare or investigate, without an opportunity to call, subpoena or even interview witnesses, and without even so much of a working knowledge as would permit him to use the documents which were in the case file and which he considered important to his client's defense. The defendant argues that, under these circumstances, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Cronic at 659.

Appendix To Petition for Writ of Certiorari
Excerpts From Appellant's Brief to the Kansas Court of Appeals

97-80014-A

IN THE
COURT OF APPEALS OF THE STATE
OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee
vs.
ROBERT M. BROWN
Defendant-Appellant

Nature of the Case

Robert M. Brown appeals his convictions of three counts of domestic battery.

Statement of Issues

I: The evidence adduced at trial was insufficient to support a finding of guilt:
   A. The weight of the evidence was insufficient to meet the burden of proof after submission of the case to the trier of fact.
   B. The stated conclusion was openly rationalized by the court by impermissibly resting presumption upon presumption.

II: The defendant was denied effective assistance of counsel, in which case prejudice must be shown, or, in the alternative, was constructively denied the assistance of counsel altogether, in which case prejudice is presumed and need not be shown.
   A. The presumption that counsel's conduct was reasonable is rebutted by the testimony of Mr. Moriarty, which is replete with

demonstrable inconsistencies, mistaken beliefs, or untruths, all of which belie any claim of a strategy.

B. Substitution of Mr. Hare, a junior associate less than two months a lawyer for Mr. Moriarty, without prior notice to the defendant on the morning of trial, amounted to ineffective assistance of counsel or, in the alternative, a complete denial of counsel.

C. No investigation or preparation was ever undertaken by any partner, member or associate of the firm prior to the morning of trial, thus depriving the defendant of effective assistance of counsel.

D. Mr. Moriarty's acquiescence to the State's 60-455 motion, as well as his subsequent agreement to have a fourth count set for trial at the same time as the three counts which were consolidated as a result of the 60-455 motion, amounted to ineffective assistance of counsel or, in the alternative, a complete denial of counsel at a critical stage of the proceedings.

E. Mr. Moriarty worked under a conflict of interest, which adversely affected his performance; prejudice is presumed.

III: The Defendant was denied his right to a trial by jury.

. . . . . .

Arguments and Authorities

II: The defendant was denied effective assistance of counsel, in which case prejudice must be shown, or, in the alternative, was constructively

denied the assistance of counsel altogether, in which case prejudice is presumed and need not be shown.

> Standard of Review: "Once a proper determination of the issue of claimed ineffective assistance of counsel has been made by the trial court, the scope of review by the appellate court is to review de novo the trial court's analysis of the performance and prejudice components, which are mixed questions of law and fact." State v. Rice, 261 Kan. 567, Syl. #16, 932 P.2d 981 (1997).
>
> "Before counsel's assistance is determined to be so defective as to require reversal of a conviction, the defendant must establish two things. First, the defendant must establish that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel's performance was less than that guaranteed to the defendant by the Sixth Amendment to the United States Constitution. Second, the defendant must establish that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial." State v. Orr, 262 Kan. 312, Syl. #1, 940 P. 2d 42 (1997). See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984).
>
> "With regard to the required showing of prejudice to the defendant in a claim of ineffective assistance of counsel, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

> sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Orr at Syl. #3. See Strickland.

In interpreting the prejudice prong, the Supreme Court has identified a three kinds of cases in which prejudice is presumed and need not be shown. They are: 1) "where there has been an actual or constructive denial of the assistance of counsel altogether" (Strickland, 466 U.S. at 692); 2) when there are "various kinds of State interference" (Id.); or 3) when "a defendant shows that his counsel actively represented conflicting interests," which "actually affected the adequacy of his representation." (Cuyler v. Sullivan, 446 U.S. 335, 350, 349, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980)).

To sustain a challenge of ineffectiveness, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2 ed 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides." Id. In U.S. v. DeCoster, 487 F.2d 1197, 1202 (D.C. Cir. 1973), which is cited both in Strickland and in State v. Schoonover, 2 Kan. App. 2d 481, 582 P.2d 292 (1978), the court stated that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."

In Schoonover, whose standards were cited with approval in State v. Chamberlain, 236 Kan. 650, 694 P.2d 468 (1985), the court explained that:

> "The 'reasonably competent' standard is no more than shorthand for the standard imposed by the Code of Professional Responsibility, especially Canons 6 and 7 and the Disciplinary Rules thereunder (Rule No. 501, 220 Kan. Cix *et seq.*). It also we suppose, establishes a standard for malpractice, since lawyers, like other professionals, are required to have and exercise the learning and skill ordinarily possessed by members of their profession in their community." Schoonover at 488.

In 1988, the Model Rules of Professional Conduct were adopted as Rule 226 of the Kansas Supreme Court. They were adopted in addition to the Code of Professional Responsibility, which continues as a general guideline of required professional conduct. Supreme Court Rule 226, Prefatory Rule.

A. The presumption that counsel's conduct was reasonable is rebutted by testimony of Mr. Moriarty, which is replete with demonstrable inconsistencies, mistaken beliefs, or untruths, which belie any claim of a strategy.

B. Substitution of Mr. Hare, a junior associate less than two months a lawyer for Mr. Moriarty, without prior notice to the defendant on the morning of trial, amounted to ineffective assistance of counsel or, in the alternative, a complete denial of counsel.

> *"That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.* The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce

> just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. at 685. (Emphasis added).

Mr. Hare did nothing more than stand in for Mr. Moriarty at the trial. Mr. Hare announced as much to the court when he first made his appearance: "Judge, I understand all four counts are being tried together. This is actually - - for the record, Judge, *this is Mr. Moriarty's case*. He's double set, and I'm here in his stead and willing to try the case." (R. V, 2) (Emphasis added). It is doubly unfortunate that Mr. Hare, whose duty is was to bring to bear "such skill and knowledge as will render the trial a reliable adversarial testing process (Strickland, 466 U.S. at 688)" admittedly *did not have a trial knowledge of the case*:

> "Q. (MR. GERSTLE) Would it be fair to say that your knowledge of the case was a working relationship - - or a working knowledge, as opposed to a trial knowledge of the case? Would that be a fair characterization?
>
> A. (MR. HARE) Yes, that would be a fair characterization." (R. VI, 27)

Would anyone entrust a life and death surgical operation to a surgeon who had a "working knowledge" as opposed to a "surgical knowledge" of the operation? In the present case the "surgeon," (Mr. Hare) admitted he did not have the requisite surgical knowledge to perform the surgery but proceeded anyway—and the patient did not survive. Though the defendant stood to inherit a criminal record and suffer years of incarceration as a result of being convicted, Mr. Hare entered his appearance in the case, which he described

to the court as "Mr. Moriarty's case (R. V, 2)" anyway – *knowing* that he was not prepared.

The extent of Mr. Hare's lack of preparation is apparent from the record. Mr. Hare had not reviewed the police reports or even had access to the case file prior to the morning of the trial (R. VI, 6-7, 8), and his first opportunity to prepare came only hours before trial. (R. VI, 8) He admitted that no discovery proceedings of any type were undertaken by any member of the firm on behalf of the defendant, nor would time have permitted Mr. Hare to avail himself of such opportunities had he deemed them necessary. (R. VI, 28) He did not know who the witnesses were or who the witnesses might be (R. VI, 7), and admittedly did not have time to call witnesses or produce exhibits of evidence. (R. VI, 27) Mr. Hare admitted that, as the attorney in charge of the case, production of such witnesses and exhibits was clearly his responsibility. (R. VI, 27) In fact, no witnesses or exhibits of evidence were ever produced on behalf of the defendant. (R. V, 110;1-123) Mr. Hare's "defense" consisted essentially of a statement that no defense would be offered. (R. V, 110-111)

Similarities to the present case are found in Powell v. Alabama, 287 U.S. 45, 77 L. Ed 158, 53 S. Ct. 55 (1932). In that case, the court considered a situation where counsel for the defendants was appointed on the day of trial and allowed to represent the defendants even after he advised the court that he had not had an opportunity to prepare the case. Id. 287 U.S. at 55. The court found that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." Id., 287 U.S. at 53.

In U.S. v. Cronic, 466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 (1984), the court evaluated the rationale of the Powell court:

> "The Court did not examine the actual performance of counsel at trial, but instead concluded that under these circumstances the

> likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair. Powell was thus a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial." Id., 466 U.S. at 660-661.

The defendant contends that in this case, the surrounding circumstances justify a similar presumption of ineffectiveness. The designation of Mr. Hare to "represent" the defendant on the morning of trial was *both* so indefinite *and* so close upon the trial as to amount to a complete denial of effective assistance of counsel.

C. No investigation or preparation was ever undertaken by any partner, member or associate of the firm prior to the morning of trial, thus depriving the defendant of effective assistance of counsel.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. The American Bar Association defines the duty to investigate as follows:

> "Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. *The duty to investigate exists regardless of the accused's admissions or statements to defense*

> *counsel of facts constituting guilt or the accused's stated desire to plead guilty."* ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Third Edition, Standard 4-4.1(a), p. 181 (1993). (Emphasis added).
>
> "Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively....*The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate's role."* Id., Commentary to Standard 4-4.1, p. 183. (Emphasis added).

The record makes clear that there was no preparation or investigation of any type conducted in this case by Mr. Moriarty or Mr. Hare. Mr. Hare's lack of preparation and investigation is discussed above.

Mr. Moriarty testified that not one witness was subpoenaed on behalf of the defendant, although Mr. Brown requested this be done (R. XVII, 26-27); that he had never prepared an outline for trial counsel J. Ryan Hare or sat down with him to discuss the intimate parameters of the case (R. XVII, 45), and that he had never sat down face to face with the defendant to specifically discuss the criminal case. (R. XVII, 7) Mr. Moriarty also testified that he was aware from conversations with the defendant that Ms. Graddy had a criminal record, but Mr. Moriarty did not deem further investigation necessary. (R. XVII, 8-9)

Mr. Moriarty testified that Mr. Brown had asked Mr. Moriarty to involve another attorney, Connie Boysen, in the case. (R. XVII, 48) He also testified that the defendant had told Mr. Moriarty that this type of case "was a specialty of hers (R. XVII, 48)," and that he had no reason to dispute that she may very well be an expert in that area. (R. XVII, 49) Mr. Moriarty testified that he told the defendant "that that was bullshit" because the attorney the defendant wanted to involve was pregnant. (R. XVII, 48)

The firm's bills show that no discovery proceedings of any type were ever undertaken by any member of the firm, and that not one billable minute of time was spent by any employee of the firm on preparation in the criminal matter prior to the very morning of trial. (R. XII, Defendant's Exhibit E)

Mr. Moriarty testified that the defendant would call at least twice a week (R. XVII, 52) over the course of eight months, and that there were a lot of office contacts that just didn't get billed. (R. XVII, 41-42) Yet in all these contacts, Mr. Moriarty never spoke to the defendant about the criminal matter. (R. XVII, 7)

Even if Ms. Graddy's testimony proved favorable, there were still seven other prosecution witnesses to impeach during cross-examination. *And trial counsel did not even know who they were or who they might be.* (R. VI, 7)

What was lost: The defendant testified that he had informed his counsel of the availability of numerous witnesses. (R. XVII, 69) Six of those witnesses were physically present in the courtroom at the defendant's motion for new trial. (R. XVII, 69) Mr. Brown testified that these and other witnesses would have testified to everything from character, to witnessing specific episodes of Ms. Graddy's violent streak, to refuting specific testimony that was offered by police officers, to documenting that the defendant was placed in a posture quite often where he would have to defend himself

just to obtain exit from his own home. (R. XVII, 69) The defendant's testimony that he requested witnesses and was told they were not needed is corroborated on one occasion by Mr. Moriarty himself in his testimony that he did not see fit to produce or even question a witness who the defendant wanted called. (R. XVII, 26-27)

The defendant was prepared to produce a witness to an incident where Ms. Graddy had called 911 to report domestic violence when, in fact, the defendant was not even present in the home. (R. XVII, 70) The defendant was also prepared to produce a witness to the "she deserved it" comment, which the State spent considerable time emphasizing. (R. VI, 56) The defendant testified that he had also made Mr. Moriarty aware of the availability of photographs of his personal property which had been damaged during occasions of Ms. Graddy's violent streak. (R. XVII, 69) The defendant also asked Mr. Moriarty on more than five occasions to obtain a police report detailing an instance where Ms. Graddy came to his home and kicked his front door off the hinges . . .

The defendant also testified that there were many other police reports. He testified under cross-examination that not only was he prepared to provide dates but was also prepared to provide the reports themselves to the district attorney at that time. (R. XVII, 79) The defendant testified that these reports would show that Ms. Graddy had made his home "a revolving door for the police." (R. XVII, 80) The defendant eventually obtained the reports himself by resort to the Freedom of Information Act (R. XVII, 79-80) and brought them to the hearing on his motion for new trial. (R. XVII, 79).

Mr. Moriarty also had evidence in his files which showed that Ms. Graddy had filed a fraudulent common law divorce action on the very same date as she alleged one of the charges of battery against Mr. Brown. (R. XII, Defendant's Exhibit E) Essentially, then, Mr. Moriarty needed only to look

inside his files to see that one of the police reports had been made in concert with another court action in which it was later determined that Ms. Graddy had defrauded the court.

The defendant also asked Mr. Moriarty to investigate Ms. Graddy's criminal record. (R. VI, 41) As was uncovered by the defendant's counsel during the motion for new trial, the defendant did have a conviction for violation of check laws, a crime of truth and veracity that could have been used to corroborate Ms. Graddy's admitted propensity for untruthfulness. (R. XVII, 9)

The defendant also testified that Ms. Connie Boysen, whom he had attempted to get to work with Mr. Moriarty in the criminal case, was an attorney who specializes in battered men cases where the woman is the aggressor. He testified that Ms. Boysen was in touch with the medical community to a large extent, and that he felt working with her might help to expose some of the psychological elements that might be pertinent to his defense. (R. VI, 43-44) Mr. Moriarty, who testified that he had no reason to dispute that she may very well be an expert in that area (R. XVII, 49), nonetheless dismissed his client's reasonable request as "bullshit" based on the premise that she was pregnant, and this may well have given his client a tactical advantage Mr. Moriarty considered immoral, although there is no professional standard or canon of ethics which would have called her engagement into question. (R. XVII, 48) Thus, the testimony of Ms. Graddy's therapists was never sought. Was this an exercise of professional judgment, or an abdication thereof?

Further, examination of R. XII, Defendant's Exhibit E will show that Mr. Moriarty had information in his files in the form of a sworn affidavit that proved that Ms. Graddy lied on the 12/20/94 police report when she told the police she had lived in the home for one and one half years at the time when in fact she had never lived there. (Additions to Record, 12/20/94 Police Report; R. XII, Defendant's Exhibit E) Given

the court's theory of the defendant's guilt, this would have been huge. The court might have inferred truth in testimony from obvious lies within the police reports rather than vice versa..

In Kimmelman v. Morrison, 477 US 365, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986), the court dealt with a case, where, as in the present case, there was a "total failure to conduct pretrial discovery, and one as to which counsel offered only implausible explanations." Id., 447 U.S. at 386. The court concluded that:

> "Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pre-trial preparation puts at risk both the defendant's right to an "'ample opportunity to meet the case of the prosecution,'" [citations omitted] and the reliability of the adversarial testing process. [citations omitted]. Id., 447 U.S. 365, 385.

And such is State v. Robert M. Brown.

D. Mr. Moriarty's acquiescence to the State's 60-455 motion, as well as his subsequent agreement to have a fourth count set for trial at the same time as the three counts which were consolidated as a result of the 60-455 motion, amounted to ineffective assistance of counsel or, in the alternative, a complete denial of counsel at a critical stage of the proceedings.

The State's 60-455 motion, whereby the State sought to consolidate all of the battery counts against the defendant in one complaint, was a critical stage of this case. Mr. Moriarty's acquiescence to this motion (R. III, 2), which was not based upon any strategy grounded in fact (see discussion II, 7.),

resulted in three counts of domestic battery being combined in a single complaint (R. XIV, 3-4). The defendant's position was further eroded when Mr. Moriarty offered no opposition on 10/15/96 to having an additional charge of domestic battery set for trial at the same time as the three other counts. (R. XIV, 3)

> "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Cronic, 466 U.S. at 659.

"[C]ounsel . . . is required at every stage of a criminal proceeding where the rights of a criminal accused may be affected." Mempa V. Rhay, 389 U.S. 128, 134, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967) "The right to counsel is not a right confined to representation during the trial on the merits." Moore V. Michigan, 355 U.S. 155, 160, 2 L. Ed. 2d 167, 78 S. Ct. 191 (1957).

The 60-455 motion on 9-17-96, as well as the hearing on 10-15-96, where an additional count was set for trial with the amended complaint, were critical stages of the proceedings herein where the defendant's rights were affected. Mr. Moriarty was made aware of the State's 60-455 motion on 8-22-96. (R. IV, 7) He was advised by the State's attorney on that date that the motion was "pretty lengthy" and that "it might take an hour to put on all the evidence." (R. IV, 8) The court set the matter for hearing on 9-17-96. On 9-17-96, Mr. Moriarty consented to consolidation of the counts without objection or argument: "What we're going to do today is this: We're not going to oppose the State's motion to

refile an Amended Complaint alleging the other two batteries. And they're going to file an Amended Complaint, so that, in this case, there will be three batteries." (R. III, 2) On 10-15-96, Mr. Moriarty summarily agreed to have the fourth count of battery set for trial with the previously consolidated three counts of battery. (R. XIV, 3)

The believability (or unbelievability) of Mr. Moriarty's claims that he acceded to the 60-455 motion because the defendant and Ms. Graddy were "getting along fine," and that he and the defendant jointly decided to "condense stuff to keep peace in the home" has been discussed previously (See above at II, A, 7, pp. 26-28).

The Price of Acquiescence: That the defendant suffered actual and irreparable prejudice as a result of consolidation of the charges is beyond dispute. The cost of acquiescence to this motion was, pure and simple, to provide the State with a viable prosecution strategy. Before the combination of the cases, the State had two police officers who could provide only circumstantial testimony (R. V, 84;89), a complaining witness who had informed them many times over of her intent to recant (R VI, 15 and R. V, 40;41), and no eye-witnesses. After the combination of all counts, the State had a parade of police officers to testify and a *pattern* to point to. That pattern became the State's entire argument, forsaking all others. (R. V, 111-113;117-119) The main body of the prosecutor's closing argument runs from (R V, 111) line 8 to (R V, 113) line 19. It consists of 62 Pica lines of text. Of those 62 lines, only 8 lines (R V, 113, lines 12-19) do not specifically address a *pattern of abuse* or discuss the events as part of a larger pattern or dynamic of the relationship between Ms. Graddy and the defendant.

In closing arguments, the prosecutor, Mr. Howe, calls the defendant "the master manipulator" and suggests that it is the defendant's pattern of abuse which has forced Ms. Graddy to testify favorably to the defense. (R. V, 119) Mr.

Howe states "And he knows that's the way she's going to testify, because he pulls the string." (R. V, 119) Mr. Howe suggests that Ms. Graddy's psychological problems are due to the pattern abuse of the defendant rather than her rapist/stepfather. (R. V, 117-118) He states "I mean, if this person has any psychological problems, he's feeding that by the way he treats her and by the way that relationship works. It's not surprising that she has those problems, considering the situation." (R. V, 118) Mr. Howe states to the court that "based on the fact that it's his house, he can control her at his whim." (R. V, 111)

Mr. Howe then goes on to place the State's lack of evidence into perspective by stating "even if there is some credence to the fact that she is now testifying today that those injuries were not caused by him - - I think the stronger evidence is, based on his ability to control her, that it is not inconsistent with his pattern of abuse; that her testimony today is consistent with him controlling her, manipulating her." (R. V, 112) Mr. Howe calls Ms. Graddy a "poster child" for abuse. He goes on to say that "she fits domestic violence to the 'T'; that cycle of violence where she gets back together with him, and then another abusive situation; and then she gets back together with him again." (R. V, 112-113)

Mr. Howe even goes so far as to state that, absent the pattern, there is insufficient evidence to support the convictions: "You have the injuries - - which it may be plausible, if you said one incident, maybe it's plausible that she injured herself or got in some accident—but when you've got four separate incidents .. . . " (R. V, 112) Essentially, Mr. Howe indicates that reasonable doubt would exist without the alleged pattern of abuse, which was provided by virtue of Mr. Moriarty's acquiescence to the State's 60-455 motion. *The State's entire argument would cease to exist absent combination of the counts.*

The 60-455 hearing was not merely a critical stage of the trial; it was *the most* critical stage of the trial. It was the stage where the State acquired a prosecution strategy. It is equally clear that in allowing the counts to be combined with neither argument nor defensible strategy for lack thereof, Mr. Moriarty entirely failed "to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 649

Review of the facts surrounding the combination of these cases will clearly show that the defendant was "constructively denied counsel at a critical stage" of these proceedings, to wit, the 60-455 motion, and prejudice (which has been demonstrated) is presumed. "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. Cronic, 466 U.S. 659, n 25. At the very least, the defendant submits that Mr. Moriarty's performance was deficient, and that but for his errors, there is a reasonable probability that the result of the trial would have been different . . .

E. Mr. Moriarty worked under a conflict of interest, which adversely affected his performance; prejudice is presumed.

> "One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In Cuyler v. Sullivan, 446 U.S. at 345-50, 64 L. Ed 2d 333, 100 S. Ct. 1708, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties....Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an

> actual conflict of interest adversely affected his lawyer's performance.' Cuyler v. Sullivan, supra, at 350, 348, 64 L. Ed. 2d 333, 100 S. Ct. 1708." Strickland, 466 U.S. 668, 692.

Rule 1.7(b) of the Kansas Model Rules of Professional Conduct states: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client *or to a third person, or by the lawyer's own interests* . . . " (Emphasis added).

During the course of his representation of the defendant, Mr. Moriarty consciously took actions and made decisions which were *calculated* to further interests other than those of the defendant, thus breaching his duty of loyalty to the defendant. First, Mr. Moriarty admitted that he did not pursue aggressive impeachment of Ms. Graddy because she had a "ton of problems" . . .

The second instance of conflict is Mr. Moriarty's decision to tape record a meeting with Ms. Graddy for the stated purpose of confirming his suspicions about and providing evidence which could incriminate his client.

> "Q: All right. So you made the legal decision that you would not honor his request to call a witness that he had asked you to call?
>
> A: Yeah, because I already had a tape recording of Robin saying that she recanted everything. And I tape recorded that conversation. And in it - - to be honest with you, I thought that Bob may be trying to influence her and try to get her to avoid service. So what I did is, I asked her very specifically, if Bob was trying to do that." (R. XVII, 27)
>
> ....

> "A. Yeah. She was there. And I told her I was going to tape record the conversation, *because* my concern was that Bob had put her up to coming in." (R. XVII, 51-52) (Emphasis added).

How could this action not have been *calculated* to incriminate the defendant? It is one thing for a defense attorney to have suspicions about his client, but it is entirely another to attempt to confirm those suspicions and memorialize them on tape, when the fact of such confirmation *could not possibly* inure to his client's benefit. Mr. Moriarty's stated purpose in eliciting incriminating information about his client on tape cannot be reconciled with his duty of loyalty to the defendant. The defendant submits that this action takes on greater significance when viewed in the context of the entire case, and may explain why Mr. Moriarty just didn't do much of anything by way of preparation or investigation that would help exonerate his client. Perhaps his entire "strategy" was tainted by his obviously compromised view of his duty of loyalty.

III. The defendant was denied his right to a trial by jury.

The standard of review is reversible error. "Although some constitutional errors do not require reversal, the right of a criminal defendant to a jury trial is so fundamental that a violation of the right cannot be harmless error." State v. Roland, 15 Kan. App. 2d 296, 807 P.2d 705 (1991).

> "Since the right to a trial by jury is constitutionally preserved, waiver of the right should be strictly construed to afford a defendant every possible opportunity to receive a fair and impartial trial by jury....[T]he test for determining the validity of a waiver of the right to a jury trial is whether the waiver was voluntarily made by a

> defendant who knew and understood what he was doing. [Citation omitted.]...[A] waiver of the right to a jury trial will not be presumed from a silent record." State v. Irving, 216 Kan. 588, 589, 533 P.2d 1225 (1975).

"[I]n order for a criminal defendant to effectively waive his right to a trial by jury, the defendant must first be advised by the court of his right to a jury trial, and he must personally waive this right in writing or in open court on the record." Irving at 590. "In order to waive the right to a jury trial under these circumstances, defendant must first be advised by the court of his or her right to a jury trial, and defendant must personally waive that right in writing or in open court." State v. Jones, 19 Kan. App. 2d 982, 984, 879 P.2d 1141 (1994). In both Irving and Jones, the record contained no waiver of a jury trial and the convictions were vacated and remanded for a new trial . . .

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS, Plaintiff-Appellee Johnson County
District Ct Case No: 96DV290,96DV740
VS. Appellate Ct Case No : 97-80014-A

ROBERT M. BROWN, Defendant-Appellant

Party Filing Appeal: Robert M. Brown

MOTION TO ORDER PUBLICATION OF MEMORANDUM OPINION

Movant is the Appellant in Appellate Court Case No. 97-80014-A. On 08/13/99, the Court of Appeals of the State of Kansas published a memorandum opinion in the above captioned case.

THE COURT OF APPEALS' OPINION DECLARES LITERAL APPLICATION OF K.S.A. 21-3412 UNCONSTITUTIONAL

The Appellate Court, on page 8 of its opinion, stated as follows:

> "The 1996 amendments to K.S.A. 21-3412 do not apply in Brown's case. At the time he was charged with all of the counts of battery, he did not have any previous convictions. It would have been a violation of the prohibition against ex post facto laws and a violation of his due process rights to sentence him on the second and third convictions as if his first conviction had occurred before he committed the second and third offenses."

This opinion supersedes and rules unconstitutional K.S.A. 21-3412, which states in relevant part that for the purpose of determining whether a conviction is a first, second, third or subsequent conviction in sentencing, that:

> "(O)nly convictions occurring in the immediately preceding five years *including prior to the effective date of this act* shall be taken into account . . ."
> K.S.A. 21-3412(4)(C)(iii) (Emphasis Added)
> "(I)t is irrelevant whether an offense occurred before or after conviction for a previous offense."
> K.S.A. 21-3412(4)(C)(iv)

As these provisions clearly permit the court to sentence a defendant on second and third convictions as if his first conviction had occurred before he committed the second and third offenses, the ruling of the Court of Appeals in the above captioned case has adjudicated K.S.A. 21-3412(4)(C)(iii) and K.S.A. 21-3412(4)(C)(iv) violative of due process rights and the prohibition against ex post facto laws and therefore unconstitutional.

The Court of Appeals' opinion will be of significant value as precedent to all offenders who's sentences have been enhanced pursuant to K.S.A. 21-3412(4)(C)(iii) and K.S.A. 21-3412(4)(C)(iv).

THE COURT OF APPEALS' OPINION ESTABLISHES A NEW STANDARD FOR PRESERVATION OF THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL THAT IS CONTRARY TO EXISTING LAW AND AUTHORITY

The Court of Appeals stated on Page 5 of its decision, "If Brown seriously objected to Hare's representation, then

he should have made his objections at the beginning of the trial." This decision overrules decades of prior law.

> "The courts must indulge `every reasonable presumption against waiver' of the right to counsel, and will `not presume acquiescence in the loss of fundamental rights [i.e., the right to counsel].'" State v. Lowe, 18 K.A. 2.d 72, 74, 847 P.2d 1334 (1993) (Citations Omitted)

> "It has been pointed out that courts indulge every reasonable presumption against waiver of fundamental constitutional rights and that we do not presume acquiescence in the loss of fundamental rights. (Citations Omitted)" Johnson v. Zerbst, 304 U.S. 458, 464 (1938)

The Court of Appeals' requirement here that a defendant express dissatisfaction with his trial counsel before trial to preserve a later claim of ineffective assistance resulting from circumstances which were unknown to the defendant at the time of trial presumes acquiescence through silence in the loss of fundamental rights.

This decision raises the bar significantly for any defendant raising a claim of ineffective assistance of counsel in Kansas. It also represents a departure from the standard adopted by the Supreme Court of the United States in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984) and adopted by this Court in Chamberlain v. State, 236 Kan. 650, 694 P.2d 468 (1985). For these reasons, it is of significant value as precedent.

The Appellate Court's opinion triggers the exception to memorandum form which is embodied in Supreme Court Rule 7.04(a). Appellant moves this court to order publication of this memorandum opinion pursuant to Supreme Court Rule 7.04.

Respectfully submitted this 10th day of September, 1999:

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